

1993

# Knowledge Data Systems v. Utah State Tax Comission, Auditing Division of the Utah State Tax Commission : Unknown

Utah Court of Appeals

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R. Bruce Johnson; David J. Crapo; Holme, Roberts & Owen.

Jan Graham; Attorney General; Gale Francis; Assistant Attorney General.

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BRIEF

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DOCKET NO. 930323



JAN GRAHAM  
ATTORNEY GENERAL

FILED

OCT 22 1993

COURT OF APPEALS

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October 22, 1993

HAND DELIVERED

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals  
230 South 500 East #400  
Salt Lake City, Utah 84102

Re: Supplemental Authorities in the matter of Knowledge  
Data Systems v. Utah State Tax Commission, Case No.  
930323

Dear Ms. Noonan:

Enclosed with this letter, please find copies of  
supplemental authority to the Respondent's brief in the above  
referenced matter.

In accordance with Utah Rules of Appellate Procedure 24(j),  
the attached copy of Union Pacific Railroad Company v. Auditing  
Division, Utah State Tax Comm'n, 842 P.2d 876 (Utah 1992), is  
submitted as supplemental authority for Respondent's arguments on  
pages 36-39 of the brief of Respondent.

Also attached is the case of State v. Webb, 790 P.2d 65, 77-  
78 (Utah App. 1990) submitted as supplemental authority for  
Respondent's argument on pages 32 and 33 of Respondent's brief.

Very truly yours,

Gale K. Francis  
Assistant Attorney General

GKF:ds  
Enclosures  
cc: David J. Crapo, Esq.

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UTAH COURT OF APPEALS

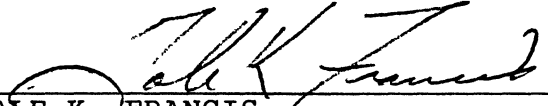
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KNOWLEDGE DATA SYSTEMS,	)	
	)	
Petitioner/Appellant,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
AUDITING DIVISION OF THE	)	Case No. 930323
UTAH STATE TAX COMMISSION,	)	
	)	
Respondent/Appellee.	)	

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Respondent, through its attorney of record, Gale K. Francis, Assistant Attorney General, hereby certifies that Supplemental Authorities, together with a true and correct copy of this Certificate of Service, were hand-delivered on October 22, 1993 to the following:

David J. Crapo  
Holme, Roberts & Owen  
111 E. Broadway #1100  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
GALE K. FRANCIS  
Assistant Attorney General  
Attorney for Respondent/Appellee

else by name. Although the testator neglected to affirmatively bequeath his property to his stepchildren, the will clearly expresses by negative implication his intent to leave his property to them.

Implying a gift to the testator's stepchildren in this case effectuates his intent and avoids disposing of his assets through intestacy. Consequently, I am persuaded that the testator's assets should pass under the will to his four stepchildren.

STEWART, J., concurs in the concurring and dissenting opinion of DURHAM, J.

ZIMMERMAN, Justice: (Concurring and Dissenting)

I would dismiss the appeal.

Hunt quite plainly brought this appeal in his capacity as personal representative of the estate. That much is clear from the notice of appeal filed by "Richard L. Hunt, Personal Representative of the Estate of Reed Dwane Hunt" on October 6, 1989. Hunt then resigned as personal representative of the estate on November 9, 1989. No one has moved to substitute a successor personal representative as appellant in this appeal. Thus, there has been a failure to substitute parties pursuant to rule 38(b) of the Utah Rules of Appellate Procedure. Utah R.App.P. 38(b).

Whatever standing to pursue this appeal Richard L. Hunt as an individual heir might have, see *Provo City Corp. v. Willden*, 768 P.2d 455, 457 (Utah 1989); *Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1170-77 (Utah 1987); *Terracor v. Utah Bd. of State Lands*, 716 P.2d 796, 798-99 (Utah 1986); *Jenkins v. Swan*, 675 P.2d 1145, 1148-49 (Utah 1983); *Stromquist v. Cokayne*, 646 P.2d 746, 747 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978), acting as an individual, he is a separate entity from Richard L. Hunt, a personal representative. In light of his

resignation as personal representative, Hunt has no authority to prosecute this appeal as personal representative, and Hunt, as an individual, filed no notice of appeal in this action. Therefore, Hunt has no standing to pursue this appeal.<sup>1</sup>

The majority relies on rule 61 of the civil rules as a ground for treating as surplusage Hunt's designation of his status as "personal representative" in the notice of appeal. See Utah R.Civ.P. 61. This is a plain misuse of the rule. The capacity in which one consciously takes an appeal is hardly "surplusage." And as the majority candidly notes, as a personal representative, Hunt almost certainly lacked standing. Standing, of course, is an issue that is never waived and can be raised by any party or by the court at any time. See *Terracor*, 716 P.2d at 798; *Stromquist*, 646 P.2d at 747; *Wade v. Burke*, 800 P.2d 1106, 1108 (Utah Ct.App.1990); *Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901, 904 (Utah Ct.App.1988).

If I were to reach the merits, however, I would affirm.



UNION PACIFIC RAILROAD  
COMPANY, Petitioner,

v.

AUDITING DIVISION OF THE UTAH  
STATE TAX COMMISSION,  
Respondent.

No. 910150.

Supreme Court of Utah.

Nov. 6, 1992.

Utah State Tax Commission determined that railroad owed sales and use

bution requested does not benefit the estate. See *In re Yonk's Estate*, 115 Utah 292, 302, 204 P.2d 452, 458 (1949). See generally P.G. Guthrie, Annotation, *Right of Executor or Administrator to Appeal from Order Granting or Denying Distribution*, 16 A.L.R.3d 1274, 1276-1300 (1967 & Supp.1992).

Cite as 842 P.2d 876 (Utah 1992)

taxes on certain purchases and services. Railroad petitioned for review. The Supreme Court, Durham, J., held that: (1) railroad owed sales and use tax on its in-state purchases of diesel fuel and ballast even though railroad transported materials for its own use outside Utah, and (2) railroad owed sales in use tax on some, but not all, services performed in Oregon on railroad's cross ties.

Affirmed in part, reversed in part, vacated in part.

1. Administrative Law and Procedure  
⇨390

Because courts should uphold agency rules if they are reasonable and rational, court should also uphold reasonable and rational departures from those rules absent showing that departure violated some other right.

2. Taxation ⇨1233

Railroad's purchases of fuel and ballast transported for its use outside Utah were not exempt from sales and use tax under exemption for Tax Commission's rule on interstate commerce for sales in which seller is obligated to physically deliver property across state boundary line to buyer; evidence showed that physical delivery occurred in Utah when vendors loaded fuel and ballast on railroad's cars and that vendors had no obligation to deliver fuel or ballast out of state.

3. Taxation ⇨1233

Railroad's purchases of fuel and ballast transported for railroad's use outside Utah was not exempt from Tax Commission's rule on interstate commerce under exemption pursuant to which common carrier is deemed agent of vendor where delivery is made by seller to common carrier for transportation to buyer outside Utah; railroad took delivery of fuel and ballast in capacity of purchaser and consumer and not in capacity of common carrier.

4. Administrative Law and Procedure  
⇨763

Supreme Court applies no-deference correction-of-error standard to review

claims of unconstitutional agency action under statute providing that appellate court may grant relief if agency action, or statute or rule on which agency action is based, is unconstitutional on its face or as applied. U.C.A.1953, 63-46b-16(4)(a).

5. Commerce ⇨74.5(2)

Taxation ⇨1285

Including costs of services performed in Oregon in basis of Utah use tax imposed on railroad's cross ties did not in itself impose burden on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce ⇨71

Commerce clause permits state to tax property which has become part of common mass of property within state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

7. Commerce ⇨74.5(1)

Commerce clause does not prohibit state from including price of services performed in manufacture of tangible property in calculating basis for use tax levy. U.S.C.A. Const. Art. 1, § 8, cl. 3.

8. Taxation ⇨1285

When state bases use tax on selling price of item of tangible property, basis necessarily includes cost of services because seller incorporates costs of services into selling price. U.S.C.A. Const. Art. 1, § 8, cl. 3.

9. Taxation ⇨1285

State may include cost of services performed in connection with tangible personal property that taxpayer already owns in calculating basis for use tax.

10. Commerce ⇨74.5(1)

Although state may include price of services performed in connection with tangible property in calculating basis for use tax, it cannot impose tax which discriminates against interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

11. Taxation ⇨1285

In order for state to include out-of-state services in basis for calculating use tax, Constitution requires that those services be taxable if performed within state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

1. I agree with the majority that even if Hunt had not resigned as personal representative, he would have had difficulty establishing standing to bring an appeal acting in that capacity. A personal representative is barred from appealing where the issue on appeal concerns a dispute between the decedent's heirs and the distri-

**12. Commerce**  $\Rightarrow$ 74.5(1)

If applied correctly, Utah Sales and Use Tax Act does not discriminate against interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**13. Commerce**  $\Rightarrow$ 74.5(1)

In reviewing construction and application of Utah Sales and Tax Act in context of interstate commerce challenge, Supreme Court will uphold imposition of use tax on tangible property imported from out of state only if state could have taxed involved transactions if they had occurred within state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**14. Taxation**  $\Rightarrow$ 1234

Under Utah Sales and Use Tax Act, railroad was liable for sales and use tax on creosote treatment applied by independent contractor in Oregon to logs shipped by railroad in preparation for their use as cross ties; creosote treatment involved applying tangible personal property, i.e., creosote, to other tangible personal property, i.e., cross ties. U.C.A.1953, 59-12-103.

**15. Taxation**  $\Rightarrow$ 1234

Railroad was not required to pay use tax for amount paid to independent contractor in Oregon for milling logs into uniform size for use as cross ties and for drilling spike holes, which services were performed independently from sale of ties themselves; drilling and milling services were not "repairs or renovations" of tangible personal property. U.C.A.1953, 59-12-103(1)(g).

See publication Words and Phrases for other judicial constructions and definitions.

**16. Taxation**  $\Rightarrow$ 1319

Court would not address portion of Tax Commission's order which agreed with auditing division that railroad improperly charged and collected sales tax on only 9.82% of total repair bill for American Association of Railroads (AAR) repairs it performed in Utah, but that railroad owed no tax deficiency in light of its long-standing practice of using that formula, which was uncorrected by several audits; Commission

had not yet audited or assessed tax deficiency against railroad.

Robert A. Peterson, Salt Lake City, for Union Pacific.

R. Paul Van Dam, Rick Carlton, Salt Lake City, for Tax Com'n.

DURHAM, Justice:

In proceedings before the Utah State Tax Commission, Union Pacific Railroad Company sought relief from a sales and use tax deficiency order imposed against it by the Auditing Division of the Commission. After a formal hearing, the Commission determined that (1) Union Pacific owed sales and use tax on its in-state purchases of diesel fuel and ballast<sup>1</sup> even though Union Pacific transported the materials for its own use outside of Utah; (2) Union Pacific owed sales and use tax on certain services performed in Oregon on cross ties (commonly known as railroad ties) it owned; and (3) in the future, the Commission may assess a sales tax on the full cost of repair services Union Pacific performs on the railcars of other carriers. Union Pacific now seeks review of these determinations. It also challenges the Auditing Division's imposition of a penalty on the deficiency. We affirm the first determination, reverse the second, and decline to review the third. We also vacate the imposition of the penalty and remand the issue for further review by the Commission.

Because the issues have different factual backgrounds and standards of review, we set forth the facts and standard of review separately for each issue.

# **I TAXABILITY OF IN-STATE PURCHASES OF BALLAST AND FUEL USED OUTSIDE UTAH**

Union Pacific, through its fuel division located in Omaha, Nebraska, arranged to purchase diesel fuel from Amoco's Salt Lake City operation. Amoco loaded the fuel into Union Pacific tank cars and turned them over to Union Pacific at the

railhead. Amoco's sales invoice specifies that Amoco delivered the fuel f.o.b. at Amoco's Salt Lake City operation and that a common carrier shipped the fuel. Union Pacific produced "waybill"<sup>2</sup> summaries indicating the destination of each tank car of fuel.

Union Pacific also generated waybills showing the destination of each railcar load of ballast purchased from three Utah vendors. The vendors, MONROC, RME, and UP Resources, loaded the ballast into Union Pacific railcars, and Union Pacific then transported the ballast to its ultimate destination. One sales invoice for the purchase of ballast between MONROC and Union Pacific states, "It is hereby agreed that sale is consummated & title passes at plant site." The record does not include invoices or purchase agreements between RME or UP Resources and Union Pacific.

Union Pacific did not pay sales tax on the portion of ballast it transported for its own use outside Utah on purchases from two of the three Utah ballast vendors. Nor did Union Pacific pay sales tax on the portion of the in-state diesel fuel purchases that it transported for its own use outside Utah. The Commission upheld a deficiency order against Union Pacific for sales and use taxes on these purchases. Union Pacific claims that the Commission's rules on interstate sales exempt these purchases. See Utah Admin.R. 865-19-44S.

Section 16 of the Utah Administrative Procedures Act (UAPA) governs the standard of review in this matter. Utah Code Ann. § 63-46b-16. Because Union Pacific claims that the Commission's decision does not comport with the Commission's interstate sales rule, possible grounds for relief include section 63-46b-16, subsections 4(a) and 4(h)(ii). Section 63-46b-16(4)(a) provides for judicial relief if the "rule on which [an] agency action is based[ ] is unconstitutional on its face or as applied." Subsection 4(h)(ii) provides for judicial relief if agency action is "contrary to a rule of the agency." Union Pacific did not chal-

lenge the constitutionality of the Commission's rule or its application. We therefore conclude that Union Pacific bases this claim on subsection 4(h)(ii).

[1] Section 63-46b-16(4)(h)(ii) refers to rules promulgated by the agency itself. Because courts should uphold agency rules if they are reasonable and rational, see *Williams v. Public Serv. Comm'n*, 754 P.2d 41 (Utah 1988), courts should also uphold reasonable and rational departures from those rules absent a showing that the departure violated some other right. We will thus employ an intermediate standard (one of some, but not total, deference) in reviewing Union Pacific's claim that the Commission erred in applying its rules.

Union Pacific argues that the Commission's decision to assess sales tax on Union Pacific's purchases of fuel and ballast transported for Union Pacific's use outside of Utah does not comport with the Commission's rule on interstate commerce, codified at Utah Admin.R. 865-19-44S (rule 44S). The rule reads as follows:

A. Sales made in interstate commerce are not subject to the sales tax imposed. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. When the commodity is delivered to the buyer in this state, even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.

B. Before a sale qualifies as a sale made in interstate commerce, the following must be complied with:

1. the transaction must involve actual and physical movement of the property sold across the state line;
2. such movement must be an essential and not an incidental part of the sale;
3. the seller must be obligated by the express or unavoidable implied terms of the sale, or contract to sell, to make

guishable from a bill of lading, which is a contractual document with the vendor.

1. Gravel or broken stone laid in a railroad bed

2. The record indicates that a waybill is a document generated internally by Union Pacific to direct the route of freight cars and is distin-

Cite as 842 P.2d 876 (Utah 1992)

physical delivery of the property across a state boundary line to the buyer[.]

C. Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier is deemed to be the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges.

Subsection A makes clear that the mere fact that Union Pacific transported the fuel and ballast out of Utah does not qualify the purchases for the interstate sales exemption. Therefore, Union Pacific must look to subsections B and C to exempt the fuel and ballast purchases.

[2] Subsection B imposes three requirements that Union Pacific must meet to qualify for the exemption. Without examining the first two requirements, we conclude that Union Pacific did not qualify for the interstate sales exemption under subsection B(3) because the fuel and ballast vendors were not obligated to deliver Union Pacific's purchases outside Utah. Amoco's sales invoice for the purchase of fuel specified that Amoco delivered the fuel f.o.b. to Amoco's Salt Lake City operation. The sales invoice for the purchase of ballast from MONROC indicated that title to the ballast passed at MONROC's pit in Utah. Moreover, the record did not contain evidence of any contractual obligation of Amoco, MONROC, RME, or UP Resources to deliver Union Pacific's purchases across the state boundary.<sup>3</sup> In short, the evidence supports the conclusion that physical delivery occurred in Utah when the vendors loaded the fuel and ballast on Union Pacific's cars and that the vendors had no obligation to deliver the fuel or ballast out of state. We therefore hold that the Commission made a rational and reasonable determination that Union Pacific did not qualify for the interstate sales exemption under subsection B.

3. Union Pacific points to internally generated waybill documents that direct the route of freight cars to substantiate its claim that rule 44S exempts the ballast and diesel fuel purchases transported for Union Pacific's use outside Utah. Waybills, however, are not negotiated

[3] Subsection C presents the question of whether Union Pacific should qualify for the exemption because of its status as a common carrier. All railroad companies are common carriers under the Utah Constitution. Utah Const. art. XII, § 12. Union Pacific argues that because subsection C treats a common carrier as "the agent of the vendor," when a common carrier delivers material out of Utah it is the equivalent of the vendor's making direct delivery to the out-of-state purchaser. The Commission rejected this contention, holding that Union Pacific took delivery of the fuel and ballast in the capacity of purchaser and consumer and not in the capacity of common carrier.

Both Union Pacific and the Commission offer plausible constructions of subsection C of the interstate sales exemption rule. Although our conclusion might be different under a correction-of-error standard, we conclude that the Commission made a reasonable and rational decision. Subsection C seems to contemplate a common carrier other than the buyer. The rule speaks of delivery to "a common carrier for transportation to the buyer." If the common carrier is the buyer, there is no need for transportation to the buyer and the rule does not apply. Furthermore, while courts should generally construe taxing statutes favorably to the taxpayer and strictly against the taxing authority, "the reverse is true of exemptions." *Parson Asphalt Prods., Inc. v. State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980). We therefore affirm the Commission's ruling on this question.

## II. TAXABILITY OF CROSS TIES

In order to meet its cross tie (railroad tie) needs, Union Pacific purchased raw logs from various places and shipped them to an independent tie treating plant in Oregon. The plant treated the ties with creosote, drilled holes for spikes, and milled the ties

between the vendor and the purchaser and do not obligate the vendor "by the express or unavoidable implied terms of the sale, or contract to sell" to make physical delivery of the property across a state boundary. Utah Admin R. 865-19-44S(B)(3).

to ensure uniform size. After the treating plant completed this work, Union Pacific transported the ties to Utah and installed them there. Union Pacific then paid sales and use tax on them based only on the cost of the raw logs plus the cost of the creosote treatment. The Commission upheld a deficiency order requiring Union Pacific to include the cost of the drilling and milling in the amount taxed on the cross ties. The Commission concluded that "the cost[s] involved in creating the installed products, such as milling costs, represent services rendered in the repair or renovation of tangible personal property and are taxable," relying on Utah Code Ann. § 59-12-103(1)(g),<sup>4</sup> and also concluded that "[i]t is the addition of those costs into the total cost of the cross ties that truly represent[s] the taxable value of the ties." Union Pacific argues that the drilling and milling services do not fit the categories of taxable services contemplated by the statute. Union Pacific further contends that Utah's imposition of a sales tax on services performed in another state unconstitutionally interferes with interstate commerce.

[4] We review Union Pacific's constitutional claims under section 63-46b-16(4)(a). Subsection 4(a) provides that an appellate court may grant relief if "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied." We will apply a no-deference correction-of-error standard to review claims of unconstitutional agency action under this section. *Questar Pipeline Co. v. State Tax Comm'n*, 817 P.2d 316, 317-18 (Utah 1991). Regarding the statutory construction issue, to the extent the legislature delegated to the Commission discretion to interpret the sales tax statute, we will review the Commission's construction under a reasonableness-and-rationality standard; otherwise, we will apply a correction-of-error review to issues of statutory construction. See *Morton Int'l*,

4. Section 59-12-103(1)(g) states:

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

*Inc. v. Auditing Div.*, 814 P.2d 581, 587-89 (Utah 1991).

### A. Use Tax Based on Services Performed Out of State

[5] Union Pacific claims that Utah oversteps the constitutional boundaries drawn by the commerce clause by levying a sales tax on services rendered in Oregon. In order to analyze this claim, we must first examine the Utah Sales and Use Tax Act (the Act) and distinguish between the sales tax component and the use tax component of the Act. The Commission's rules differentiate the two:

A. The sales tax is imposed upon sales of tangible personal property made within the state of Utah, regardless of where such property is intended to be used, and on the amount paid or charged for all services for repairs and renovations of tangible personal property or for installation of tangible personal property rendered in connection with other tangible personal property.

B. The use tax is imposed upon the use, storage or other consumption of tangible personal property, and upon the amount paid or charged for the services for repairs or renovations of tangible personal property or installation of tangible personal property in connection with other tangible personal property, if the tangible personal property is for use, storage, or consumption in Utah; and, ordinarily, if the transaction does not take place within the state of Utah.

C. The two taxes are compensating taxes, one supplementing the other, but both cannot be applicable to the same transaction. The rate of tax is the same.

D. The distinguishing factor in determining which tax is applicable is normally the place where the sale or service takes place. If the sale is made in Utah, the sales tax applies. If the sale is made elsewhere, the use tax applies.

(g) services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property[.]

Cite as 842 P.2d 876 (Utah 1992)

Utah Admin.R. 865-19-1S. To recapitulate, the sales tax imposes a transaction tax on certain sales and certain services that occur in Utah. Complementing the sales tax, the use tax imposes an excise tax on tangible property and certain services performed in connection with that property, where the property is stored or used in Utah but is not subject to Utah sales tax because it was purchased or the service was performed outside of Utah. See *Barrett Inv. Co. v. State Tax Comm'n*, 387 P.2d 998, 999 (Utah 1964).

If the owner of property used in Utah paid sales or use tax in another state, that tax is credited to offset the use tax levied in Utah.<sup>5</sup> Because of the use tax, items used in Utah but purchased elsewhere share the same tax burden as those items purchased in Utah. The use tax, therefore, helps Utah merchants compete on equal terms with merchants in other states by removing the incentive for purchasers to search for states with lower sales tax in which to purchase items for use in Utah. See *id.*; *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581, 57 S.Ct. 524, 526, 81 L.Ed. 814 (1937) (*Silas Mason*); Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 10:7 (1981).

Union Pacific claims that Utah violated the commerce clause by levying a sales tax on services rendered in Oregon. In so claiming, Union Pacific misapprehends the nature of the tax imposed and how it relates to the commerce clause. Utah levied a use tax, not a sales tax. Utah did not levy a tax on the sale of the raw logs and the services performed out of state; instead, Utah taxed Union Pacific's use of cross ties within the state.

For over fifty years, the United States Supreme Court has upheld the nondiscriminatory application of a tax on the use of property that has come to rest in a state. See, e.g., *Silas Mason*; *Wilco Corp. v. Pennsylvania*, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838 (1935). In *Silas Mason*, contractors working on Grand Coulee Dam on

the Columbia River objected to the state of Washington's imposition of a use tax. Washington taxed equipment the contractors used in Washington but had purchased out of state. The Washington tax scheme levied a "tax or excise for the privilege of using within this state any article of tangible personal property," including the cost of transportation from the place of purchase. 300 U.S. at 580. The tax scheme also provided credit against the use tax for sales or use tax paid in Washington or in some other state.

Writing for the Court, Justice Cardozo noted that items obtained through interstate commerce do not necessarily remain in interstate commerce. Furthermore, he recognized that because states can levy a tax on property within the state, they can levy a tax on the use or enjoyment of property:

The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment.

*Id.* 300 U.S. at 582, 57 S.Ct. at 526.

[6-8] Hence, the commerce clause permits a state to tax property which has "become part of the common mass of property within the state." Moreover, it does not prohibit the state from including the price of services performed in the manufacture of tangible property in calculating the basis for the use tax levy. This is implicit in the nature of tangible personal property. Both raw materials and the services performed in transforming those raw materials into a finished article contribute to the value of an item of tangible property. Consequently, when a state bases a use tax on

shall be paid any difference between the tax paid and the tax imposed by [the Act] and no adjustment is allowed if the tax paid was greater than the tax imposed by [the Act]"

the selling price of an item of tangible property, the basis necessarily includes the cost of services because the seller incorporates the cost of the services into the selling price. The Court in *Silas Mason*, for example, upheld the Washington tax, which based the use tax on the total retail price of the construction equipment, not merely on the price of the unassembled component parts of the equipment. *Id.* at 579, 57 S.Ct. at 525.

[9] A state may also include the cost of services performed in connection with tangible personal property that the taxpayer already owns in calculating the basis for the use tax. The basis of the Washington tax approved in *Silas Mason* included the service of transporting goods already owned by the taxpayer. *Id.* at 580, 57 S.Ct. at 525. In *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963), the Court again considered a state use tax that included the cost of services in the basis for calculating the tax. *Halliburton* involved a use tax levied by the state of Louisiana that included the out-of-state costs of labor and shop overhead incurred in the manufacture of specialized equipment. The taxpayer manufactured oil well cementing trucks and electrical well logging trucks in Oklahoma, some of which the taxpayer used in Louisiana. *Id.* at 66, 83 S.Ct. at 1202. In examining the Louisiana use tax, the *Halliburton* Court did not object to inclusion of labor costs the taxpayer incurred in Oklahoma in the basis for calculating the Louisiana use tax.<sup>6</sup> We therefore hold that including the costs of services performed in Oregon in the basis of the Utah use tax imposed on Union Pacific's cross ties does not in itself impose a burden on interstate commerce.

#### B. Discrimination Against Interstate Commerce

[10, 11] Although the state may include the price of services performed in connec-

tion with tangible property in calculating the basis for a use tax, it cannot impose a tax which discriminates against interstate commerce. The *Halliburton* Court stated that "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70, 83 S.Ct. at 1204. The following facts stipulated by the parties in *Halliburton* demonstrate the discriminatory impact of the Louisiana tax:

If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.

*Id.* at 67, 83 S.Ct. at 1202. In order for the state to include out-of-state services in the basis for calculating the use tax, the Constitution requires that those services be taxable if performed within the state.

[12, 13] If applied correctly, the Utah Sales and Use Tax Act does not discriminate against interstate commerce. The Commission's rules provide, "The use tax is a complement to the sales tax and the rules promulgated, when applicable, are common to both taxes." Utah Admin.R. 865-21-2U; see *Barrett Inv. Co. v. State Tax Comm'n*, 15 Utah 2d 97, 387 P.2d 998, 999 (1964) (sales and use tax acts are correlative and complementary to each other). Moreover, courts should construe statutes so that they conform to constitutional mandates. Therefore, in reviewing the construction and application of the Act, this court will uphold the imposition of a use tax on tangible property imported from out of state only if the state could have taxed the in-

den, the Court held that the scheme discriminated against interstate commerce. *Id.* 373 U.S. at 75, 83 S.Ct. at 1206. See the discussion in the next section.

5. Utah Code Ann. § 59-12-104(28) exempts from sales and use tax "property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state

6. The Court, however, ultimately struck down the Louisiana use tax. An in-state manufacturer of the same item would not have been taxed on the labor and overhead costs. Because the out-of-state manufacturer faced a higher tax bur-

involved transactions if they had occurred within the state.<sup>7</sup>

### C. Application of the Utah Sales and Use Tax Act

Union Pacific purchased raw logs from various vendors located outside Utah and paid sales taxes on these purchases. After acquiring title, the railroad shipped these logs to an independent contractor in Oregon for creosote treatment and milling and drilling services in preparation for their use as cross ties. The railroad held title to the ties at all times after the initial purchase of the raw logs.<sup>8</sup> Union Pacific paid use tax based on the cost of the raw logs plus the creosote treatment. However, Union Pacific did not include the cost of drilling and milling services in calculating the basis of the use tax.

The Act permits the state to tax "retail sales of tangible personal property made within the state," certain enumerated services rendered within the state, and in-state storage, use, or consumption of tangible property purchased outside the state. Utah Code Ann. § 59-12-103. The basis for the taxation of personal property and certain services rendered in connection therewith is calculated on the "amount paid or charged" for the sale or service. *Id.* The use tax, as discussed in section A above, mirrors the sales tax in its application. Accordingly, the use tax should also be based on the amount paid for the raw logs and the amount paid for those services that are taxable under the terms of the statute. The only provisions that could conceivably apply to the milling and drilling services performed on the cross ties are the following:

7. Union Pacific also claims that Utah's use tax discriminates against interstate commerce by subjecting Union Pacific to double taxation. We summarily dismiss this contention by pointing to Utah Code Ann. § 59-12-104(28), which exempts from sales and use tax

property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by [the Act,] and no adjustment is allowed if the tax paid was greater than the tax imposed by [the Act].

(g) services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property;

(h) cleaning or washing of tangible personal property.  
Utah Code Ann. § 59-12-103.

Union Pacific argues that drilling and milling are not the same as washing, cleaning, repairing, or renovating. The Commission found that

the cost[s] involved in creating the installed products, such as milling costs, represent services rendered in the repair or renovation of tangible personal property and are taxable. It is the addition of those costs to the total cost of the cross ties that truly represent[s] the taxable value of the ties.

The notion of "taxable value" applied by the Commission implies that the Commission included the amount paid for the services performed on the ties because those services added to the value of the ties. The "value" of the ties, however, is not the proper basis for calculating use tax. The basis for calculating use tax in the instant case is the amount paid for the raw logs when purchased plus the amount paid for services that fall into one of the specified categories of taxable services.

[14] The Commission has attempted to classify the milling and drilling services as repairs or renovations. Because we conclude that the Commission has discretion to interpret the terms "repairs" and "renovations," we review the Commission action for reasonableness and rationality. Utah Administrative Rule 865-19-78S (rule 78S),

This exemption ensures that the state will not subject out-of-state sales and services to double taxation.

8. These facts distinguish the instant case from our recent case of *BJ-Titan Services v. State Tax Commission*, 183 Utah Adv Rep. 20 (March 31, 1992), in which we upheld imposition of sales tax on the cost of services performed incidental to and as part of the actual sale of tangible personal property. *Id.* at 24. The services at issue in this case all occurred independently from and well after the sale of the property itself.

Cite as 842 P.2d 876 (Utah 1992)

guides the taxation of services pursuant to Utah Code Ann. § 59-12-103:

A. Persons who wash, clean, repair, or renovate tangible personal property, whether material is furnished by the seller or not, are required to collect the sales tax upon the total charge made for the rendition of such services.

B. Amounts paid or charged for installing tangible personal property in connection with other tangible personal property are subject to tax.

The Commission found that the categories of taxable services contained in rule 78S provide for the taxation of the creosote treatment and the drilling and milling services. The creosote treatment involved applying tangible personal property, the creosote, to other tangible personal property, the cross ties. The creosote treatment is thus taxable.<sup>9</sup> See *BJ-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

[15] Rule 78S, however, does not support taxing the drilling and milling services on logs Union Pacific had previously purchased. Milling logs into uniform size and drilling spike holes do not involve the installation of tangible personal property. Furthermore, drilling and milling do not suggest the same type of activity as washing or cleaning. The Commission appears to view drilling and milling as equivalent to repair or renovation. Repair and renovation, however, suggest activities that "fix"

9. Union Pacific does not dispute this. In fact, as mentioned above, Union Pacific paid taxes on these services.

10. Rule 865-19-51S of the Utah Administrative Code (rule 51S) supports the conclusion that services performed in the creation of a newly manufactured product are not the same as the repair or renovation of an already manufactured product. Rule 51S provides:

A. The amount charged for fabrication or installation which is part of the process of creating a finished article of tangible personal property must be included in the amount upon which tax is collected. *This type of labor and service charge may not be deducted from the selling price used for taxation purposes even though billed separately to the consumer and regardless of whether the articles are commonly carried in stock or made up on special order.*

an already manufactured product. To repair is to "restore by replacing a part or putting together what is torn or broken." To renovate is to "restore to a former better state." *Webster's Ninth New Collegiate Dictionary* 998 (1984). Drilling and milling the cross ties did not involve repairing existing cross ties or restoring the existing cross ties to a former better state.<sup>10</sup> Thus, even under a deferential standard of review, we agree with Union Pacific that the drilling and milling services are not repairs or renovations within the meaning of section 59-12-103(1)(g). We note that the witness for the Auditing Division admitted as much at the hearing before the Tax Commission, and this admission went uncontested.

The proper focus is not on what Union Pacific "imported" into this state, i.e., finished railroad ties, but rather on the transactions that actually took place, whether inside or outside Utah, and the taxability of each transaction. The Commission erroneously adopted the former approach in concluding that the drilling and milling services were taxable because they contributed to the "taxable value" of the ties. Union Pacific separately purchased raw logs, drilling and milling services, and creosoting services. Union Pacific paid taxes on the purchase of raw logs and the purchase of creosoting services. But none of the provisions in the Sales and Use Tax Act permit the taxation of the drilling and milling ser-

B. Casting, forging, cutting, drilling, heat treating, surfacing, machining, constructing, and assembling are examples of steps in the process resulting in the creation or production of a finished article.  
(Emphasis added.)

Rule 51S underscores that the cost of services performed prior to the sale of an item of tangible personal property must be included in the amount paid for the item for sales tax purposes. The rule includes an extensive list that illustrates some of the types of services taxable in the sale of a finished item of tangible personal property. Services performed on items owned by the taxpayer, however, may only be taxed under rule 78S. Moreover, rule 78S's omission of an extensive list similar to the list found in rule 51S indicates that authority to tax services performed on items owned by the taxpayer is not coextensive with the authority to tax based on services performed prior to sale.



ices when performed independently from the sale of the ties themselves. We therefore hold that the Commission erred in requiring Union Pacific to pay use tax for the amount paid for these services.

### III. TAXABILITY OF AAR CAR REPAIRS

[16] Federal law requires Union Pacific to inspect for safety defects all freight cars received from other railroads that travel on Union Pacific's lines. Pursuant to rules promulgated by the American Association of Railroads (AAR), Union Pacific repairs safety defects on freight cars and charges the railroad owning the defective freight car for services and materials. According to a formula created in an audit prior to 1959, Union Pacific charged and collected sales tax on only 9.82 percent of the total repair bill for AAR repairs it performed in Utah.

The rationale behind the formula is that since Union Pacific had already paid sales use tax on the repair materials stored in its warehouse, the taxing authority needed to adjust the amount of tax charged for repairs using those materials. The Auditing Division has audited Union Pacific several times since 1959 and has not instructed Union Pacific to discontinue the practice of collecting sales tax on only a fraction of the total AAR repair bill. In this most recent audit, however, the Auditing Division issued a sales tax deficiency assessment against Union Pacific, claiming that Union Pacific's use of the 9.82 percent formula was incorrect and that Union Pacific owed sales tax on the entire amount of the AAR repairs.

On review, the Commission agreed with the Auditing Division that the 9.82 percent formula was incorrect and that Union Pacific should have collected sales tax on the full amount of AAR repairs. The Commission, however, overturned the tax deficiency assessed by the Auditing Division. Because the use of the formula was a longstanding practice left uncorrected by several audits, the Commission reasoned that imposing taxes for prior periods would constitute retroactive law making. Therefore,

without assessing a deficiency, the Commission ordered Union Pacific to collect tax on the total bill for AAR repairs beginning five days after the date of the Commission's decision. Union Pacific seeks relief from the prospective compliance required by the Commission's decision.

We decline to address this aspect of the Commission's order because the Commission has not yet audited or assessed a tax deficiency against Union Pacific in this matter, but has determined only that one hundred percent of the charge for the AAR repairs will be taxable in the future. Union Pacific does not appear to contest the abstract proposition that services and materials furnished in AAR repairs are taxable, but contends instead that it is entitled to "credits or deductions" against this tax liability to reflect taxes it has previously paid on materials for repairs. The Tax Commission, however, should determine in the first instance whether Union Pacific can validly claim to have satisfied a specific portion of its sales tax liability for AAR repair charges or in the alternative whether Union Pacific's initial purchases of inventory for use in repairs should be tax exempt. The parties themselves have not squarely confronted this issue in the proceedings below or in their briefs, and the practical effect of the Commission's order is not yet clear. Union Pacific's implicit suggestion that the Commission's order creates an abuse of the state's power to tax is purely hypothetical. Accordingly, we conclude that it would be inappropriate for us to treat this issue at this time.

### IV. PENALTY ASSESSMENT

The Auditing Division imposed a penalty on the deficiency assessment. Union Pacific did not contest the penalty before the Commission but does so before this court. The Commission may assess a penalty for negligent, intentional, or fraudulent underpayment of tax. Utah Code Ann. § 59-1-401(3). In applying the penalty, the Auditing Division and the Commission should not mechanically assess a penalty in every case of underpayment. Instead, they should determine in each case whether the taxpayer

negligently, intentionally, or fraudulently underpaid. Because Union Pacific did not raise the issue before the Commission, we have no basis in the record upon which to review the imposition of the penalty. It does not appear, however, that either the Auditing Division or the Commission has made the finding of negligence, intentional disregard, or fraud necessary to justify a penalty under section 59-1-401(3). Because we are remanding this matter for other proceedings, we vacate the imposition of the penalty and remand this issue for reconsideration by the Commission and specific findings and conclusions regarding a penalty.

### V. CONCLUSION

We affirm the Commission's decision to assess sales tax on Union Pacific's purchases of fuel and ballast transported for Union Pacific's use outside Utah. We reverse the Commission's decision to assess use tax on the drilling and milling costs paid by Union Pacific. We decline to address the Commission's conclusion that Union Pacific will henceforth be required to collect sales tax on the full amount of repairs made on other railroads' freight cars under AAR regulations. Finally, we vacate the Commission's decision to impose a penalty on the tax deficiency and remand the issue for a determination of whether Union Pacific's underpayment was negligent, intentional, or fraudulent.

HALL, C.J., HOWE, Associate C.J., and STEWART and ZIMMERMAN, JJ., concur.



**HALES SAND & GRAVEL, INC.,** Petitioner,

v.

**AUDIT DIVISION OF the STATE TAX COMMISSION OF UTAH,** Respondent.

No. 910008.

Supreme Court of Utah.

Nov. 12, 1992.

Sand and gravel seller sought review of tax deficiency and negligence penalty assessed by Tax Commission. The Supreme Court, Zimmerman, J., held that: (1) charges for delivering sand and gravel to customers were subject to sales tax, but (2) failure to pay sales tax was not negligent.

Affirmed in part; reversed in part.

#### 1. Statutes $\Rightarrow$ 205

In construing statute, court views it as a comprehensive whole rather than unrelated collection of provisions.

#### 2. Taxation $\Rightarrow$ 204(1)

Although taxing statutes are generally construed in favor of taxpayer, tax exemptions are strictly construed against taxpayer.

#### 3. Taxation $\Rightarrow$ 1267

Sales tax exemption for intrastate freight charges applied only to common carriers; accordingly, since sand and gravel seller was not "common carrier," delivery charges imposed by sand and gravel seller before title to sand and gravel passed were subject to sales tax. U.C.A.1953, 59-12-104(18).

See publication Words and Phrases for other judicial constructions and definitions.

#### 4. Taxation $\Rightarrow$ 1282

Passage of title is moment upon which sales transaction is to be valued for purposes of computing sales tax. U.C.A.1953, 59-12-103(1)(a).

[10th Cir.1986]; *Reeg v. Shaughnessy*, 570 F.2d 309, 317 (10th Cir.1978).

J & M claims that the trial court properly exercised its discretion in excluding the deposition since appellants made no showing that Mr. Brown was unavailable or even unwilling to testify. In fact, J & M claims that there was no representation made that appellants even requested Mr. Brown to testify and that the use of his deposition was merely trial strategy to avoid revealing his demeanor to the fact finder.

We have carefully scrutinized the transcript of the court's ruling and agree that no representation was made as to whether appellants had attempted to procure Mr. Brown's appearance. However, we conclude that appellants made a sufficient showing under rule 32(a) to have the deposition admitted and that the trial court abused its discretion in refusing to admit it.

[2] The element of discretion provided by the rule is a narrow one—exceptions to the preference for oral testimony apply "absent some compelling reason otherwise." *Nash v. Heckler*, 108 F.R.D. 376, 378 (W.D.N.Y.1985).<sup>2</sup> The federal cases in which the issue has been considered have held that "the mere absence of the deponent from the 100 mile area is sufficient, and the party attempting to submit the deposition into evidence need not proffer an excuse for the failure of the deponent to appear in court." *Houser v. Snap-on Tools Corp.*, 202 F.Supp. 181, 189 (D.Md. 1962); see also *Stewart v. Meyers*, 353 F.2d 591, 696 (7th Cir.1965); *Klepal v. Pennsylvania R.R.*, 229 F.2d 610, 612 (2d Cir.1956). The reasoning behind the rule is simply that "it would be too burdensome to require a deponent beyond the distance of 100 miles to appear at trial." *United States v. International Business Mchs. Corp.*, 90 F.R.D. 377, 380 (S.D.N.Y.1981). The rule applies equally to plaintiffs and defendants, see *Richmond v. Brooks*, 227 F.2d 490, 492 (2d Cir.1955), parties and non-parties. See 4A J. Moore & J.D. Lu-

cas, *Moore's Federal Practice* § 32.05 (2d ed. 1989). The distance is measured "as the crow flies" from the deponent's residence to the courthouse. *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 16, 18 (D.Conn. 1977).

The trial court apparently considered rule 32(a)(3)(B)'s exception, "unless it appears that the absence of the witness was procured by the party offering the deposition," adjudged Mr. Brown to be a party, and concluded that by not being present, he had procured his own absence. Although Mr. Brown was not a named party, even a "substantial identity of interest" between the party offering the deposition and the deponent does not, without more, raise a "spectre of illicit procurement." *Nash*, 108 F.R.D. at 378; *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st Cir.1988). "Procurement" implies that there was some collusion in having witnesses remove themselves from the reach of subpoenas or to deliberately absent themselves from the jurisdiction. *Weiss v. Weiner*, 10 F.R.D. 387, 389 (D.Md.1950). Moreover, "procuring absence and doing nothing to facilitate presence are quite different things." *Snap-on Tools*, 202 F.Supp. at 189.

The proponent of admission has the burden to show that the requirements of the rule have been met. See *Parlato v. Interport Trucking Co.*, 540 F.Supp. 1051, 1052-53 (E.D.N.Y.1982). Appellants carried this burden by presenting evidence that the deponent lived more than 100 miles from the courthouse. That evidence was never controverted. Nor is there anything in the record to suggest that Mr. Brown had procured his own absence. In fact, there is testimony that he moved to Montana "a little over two years" before trial. See, e.g., *Bellamy v. Molitor*, 108 F.R.D. 1, 2 (W.D.Ky.1983) (party deponent had always lived more than 100 miles from courthouse); see also *Starr v. J. Hacker Co.*, 688 F.2d 78, 81 (8th Cir.1982). Appellants also specifically represented to the court that none of the named parties had pro-

cedure are fashioned after the federal rules, we may properly look to authorities under the federal rules."); see also *Pate v. Marathon Steel Co.*, 692 P.2d 765, 767 n. 1 (Utah 1984).

STATE V. WEBB  
Cite as 790 P.2d 65 (Utah App. 1990)

cured the deponent's absence. It was presumably advantageous for appellants to offer live testimony as opposed to deposition evidence, see *Weiss*, 10 F.R.D. at 388, which fact "is likely to limit frequent resort to this course." *Richmond*, 227 F.2d at 492.

Although the rules of evidence may offer an alternative means of admitting depositions,<sup>3</sup> we need not address that alternative since we conclude that appellants made a sufficient showing to admit the deposition under Utah R.Civ.P. 32(a). It was established, without dispute, that Mr. Brown was a resident of Montana at the time of trial, and had been so for a considerable time. Under these circumstances, we conclude that the trial court abused its discretion in excluding the deposition.

We further conclude that the error in excluding the deposition is substantial and prejudicial. See Utah R.Civ.P. 61. The proffer made by appellants adequately indicates the materiality of the deposition evidence to their case. Mr. Brown was president of B & E and had the responsibility to negotiate contracts and to bid the work. Even the trial court believed Mr. Brown to be a "key witness" and the evidence to be "quite material." Accordingly, we reverse the judgment against appellants, and remand the case for retrial or for further proceedings consistent with this opinion. In light of this disposition, we need not address other issues raised on appeal.

DAVIDSON and BILLINGS, JJ.,  
concur.



3. Fed.R.Civ.P. 32(a) and the federal rules of evidence are cumulative, such that a deposition not falling within the provisions of rule 32(a) may still be admissible under the standards of Fed.R.Evid. 804. See 4A *Moore's Federal Practice* § 32.02[1], 32.05 (citing Fed.R.Civ.P. 43(a)); *International Business Mchs. Corp.*, 90 F.R.D. at 384.

The Utah Rules of Civil Procedure are comparable to the federal rules. See Utah R.Civ.P. 43(a) ("In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules [or] the Utah Rules

STATE of Utah, Plaintiff and  
Respondent,  
v.

Charles WEBB and John E. Humphrey,  
Defendants and Appellants.

No. 890256-CA.

Court of Appeals of Utah.

March 26, 1990.

Defendant was convicted of aggravated robbery in the Third District Court, Salt Lake County, James S. Sawaya, J., and defendant appealed. The Court of Appeals, Jackson, J., held that: (1) defendant had not received ineffective assistance of counsel on basis of conflict of interest, although codefendants were represented by two public defenders from same office; (2) defendant lacked standing to contest constitutionality of search of his housemate's purse; (3) substantial evidence existed upon which jury could reasonably find that defendant solicited, requested, commanded, encouraged, or intentionally aided codefendant in aggravated robbery of jewelry store with requisite intent; and (4) defendant's sentence for armed robbery conviction was properly enhanced under use of firearm statute, even though offense had already been enhanced to aggravated robbery due to use of deadly weapon in crime.

Conviction affirmed; remanded for corrected sentence.

# 1. Criminal Law ⇄ 1028

In absence of exceptional circumstances or plain error, appellate court normally

of Evidence...."); see also *Ruscetta*, 742 P.2d at 117. Moreover, Utah R.Civ.P. 32(a) provides that "[a] deposition previously taken may also be used as permitted by the Utah Rules of Evidence." Thus, a deposition may be admitted if the deponent is unavailable as a witness. Utah R.Evid. 804(b). "Unavailability" is defined in several ways, and includes situations where the deponent "is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." Utah R.Evid. 804(a)(5).

2. Where there is no Utah case directly on point, we turn to the federal courts that have examined the comparable federal rule. See *Heritage Bank & Trust v. Landon*, 770 P.2d 1009, 1010 n. 2 (Utah Ct.App.1989) ("As our rules of civil

will not consider issues, even constitutional ones, that have not been presented first to trial court for its consideration and resolution.

## 2. Criminal Law §1130(5)

Court of Appeals would not consider whether right to counsel guaranteed in State Constitution should be interpreted more expansively than federal provision, where defendant's appellate counsel simply asserted that different result should flow from state constitutional guarantee without adequately briefing or arguing for different analyses under the State and Federal Constitutions. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 12.

## 3. Criminal Law §641.5

Sixth Amendment right to effective assistance of counsel includes right to counsel free from conflicts of interest. U.S.C.A. Const.Amend. 6.

## 4. Criminal Law §1035(7)

Defendant who raises no objection at trial to multiple representation must show that actual conflict of interest existed which adversely affected his lawyer's performance to prevail on claim of ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

## 5. Criminal Law §641.5(4)

Defendant who shows that he objected at trial to multiple representation need not demonstrate prejudice from conflict of interest to establish ineffectiveness of counsel claim. U.S.C.A. Const.Amend. 6.

## 6. Criminal Law §641.5(6, 7)

Mere fact that codefendants were represented by two attorneys from same public defender office was alone insufficient to impose affirmative duty on trial judge to act sua sponte and appoint one defendant an attorney from different office or to inquire into propriety of representation. U.S.C.A. Const.Amend. 6.

## 7. Criminal Law §641.5(6, 7)

Defendant's pretrial motion to sever his trial from that of codefendant did not impose affirmative duty on trial judge to later act sua sponte to inquire into propriety of representation of codefendants by

two public defenders from same office, or to appoint different attorney for one defendant, where one defendant was represented by privately retained attorney at time of motion, and ruling on motion was never requested or obtained. U.S.C.A. Const. Amend. 6.

## 8. Criminal Law §641.5(6, 7)

Codefendant's motions captioned "Motions for Conflict of Interest" did not provide sufficient notice to trial court of potential conflict arising from representation of codefendants by two public defenders from same office, and thus did not impose affirmative duty on trial judge to act sua sponte and appoint different attorney for one defendant or inquire into propriety of representation, where "conflict of interest" referred to by motions appeared to be codefendant's disagreement with counsel over handling of pretrial identification issue, which had already been argued to, but rejected by, trial court. U.S.C.A. Const. Amend. 6.

## 9. Criminal Law §641.5(7)

Trial judge, by virtue of abandoned pretrial severance motion, does not know or reasonably should know before or at trial of conflict of interest on part of attorneys, representing codefendants, and thus severance motion does not impose affirmative duty on trial judge to act sua sponte to inquire into propriety of representation of codefendants. U.S.C.A. Const.Amend. 6.

## 10. Criminal Law §641.5(7)

Defendant's postconviction motion for new trial could not constitute timely "objection at trial" to alleged conflict of interest on part of counsel, and thus trial judge could not be faulted for failing to act sua sponte and inquire into propriety of representation of codefendants by two public defenders from same office. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

## 11. Criminal Law §1035(7)

Defendant could succeed on his Sixth Amendment ineffectiveness of counsel

claim only if he demonstrated both that counsel actively represented conflicting interests and that actual conflict of interest adversely affected counsel's performance, where alleged conflict was not adequately raised in trial court until after conviction. U.S.C.A. Const.Amend. 6.

## 12. Criminal Law §641.5

To show that actual conflict of interest existed on part of defense counsel, defendant must point to specific instances in record to suggest actual conflict or impairment of defendant's interest. U.S.C.A. Const.Amend. 6.

## 13. Criminal Law §641.5

Defendant's right to effective assistance of counsel is not violated where conflict of interest on part of defense counsel is irrelevant or merely hypothetical; there must be actual, significant conflict. U.S.C.A. Const.Amend. 6.

## 14. Criminal Law §641.5(6)

Defense counsel's pursuit of united defense with codefendant at joint trial did not show actual conflict of interest which would warrant finding that defendant received ineffective assistance of counsel arising from representation of codefendants by two public defenders from same office, although there was no eyewitness victim testimony identifying defendant as robber, where other witnesses testified to defendant's direct involvement before and immediately after crime, and codefendants took stand and gave entirely consistent, corroborative testimony to support their claim that others were the real culprits while they were only "patsies." U.S.C.A. Const.Amend. 6.

## 15. Criminal Law §641.5(6)

Defendant failed to demonstrate that any actual conflict of interest arising from representation of codefendants by two public defenders from same office resulted in any adverse effect on his counsel's performance, even though counsel chose to pursue united defense strategy; defendant apparently supported enthusiastically the united defense strategy until it produced unfavorable verdict, and there was no evidence that strategy was prompted by de-

sire or effort to bolster codefendant's defense at expense of defendant. U.S.C. Const.Amend. 6.

## 16. Criminal Law §1044.1(2)

Court of Appeals would not consider defendant's allegation that police had not satisfied statutory prior demand requirements prior to entering residence to mal arrest, where issue was raised for first time on appeal, record did not show that statutory noncompliance ground was unknown or unavailable to defendant before or at trial, defendant did not contend that plain error exception should apply, and defendant did not contend that any specific circumstances justified his failure to present such ground for motion to suppress to trial court. U.S.C.A. 1953, 77-7-77-7-8.

## 17. Searches and Seizures §69

Evidence showed that shotgun was located by officers in plain view while officers were lawfully present in bedroom to arrest defendant, and thus shotgun was not subject to suppression, even though shotgun may have been seized when police reentered bedroom after arrest. U.S.C.A. Const.Amend. 4.

## 18. Criminal Law §394.5(2)

Proponent of motion to suppress has burden of establishing that his own Fourth Amendment rights were violated by challenged search or seizure, as Fourth Amendment rights are personal rights which may not be vicariously asserted. U.S.C.A. Const.Amend. 4.

## 19. Searches and Seizures §161

Person who is aggrieved by illegal search and seizure only through introduction of damaging evidence secured by search of third person's premises or property has not had any of his Fourth Amendment rights infringed. U.S.C.A. Const. Amend. 4.

## 20. Searches and Seizures §162

Factors relevant to determining whether defendant had legitimate expectation of privacy in area searched include: whether defendant had any possessory or propri-

tary interest in place searched or items seized in challenged search; whether defendant was legitimately on premises; whether defendant had right to exclude others from that place; whether defendant exhibited subjective expectation that place would remain free from governmental invasion; or whether defendant took normal precautions to maintain his privacy. U.S.C.A. Const.Amend. 4.

#### 21. Searches and Seizures ¶162

Defendant's ownership or possession of items seized in allegedly unlawful search is not determinative of whether defendant's Fourth Amendment privacy rights in place searched have been infringed. U.S.C.A. Const.Amend. 4.

#### 22. Searches and Seizures ¶162

Defendant who establishes privacy interest in place searched sufficient to contest legality of that search, in order to suppress evidence seized as product of it, is not deprived of Fourth Amendment standing to assert that claim merely because another person actually owns either evidentiary items actually seized or personal effect in which seized items were found. U.S.C.A. Const.Amend. 4.

#### 23. Searches and Seizures ¶164

Defendant had standing to contest legality of search of apartment rented by his housemate, where defendant testified that he actually resided in apartment with his housemate and their child in "common law marriage," and that he contributed to household expenses, including rent. U.S.C.A. Const.Amend. 4.

#### 24. Searches and Seizures ¶180

Warrantless search conducted pursuant to consent that is voluntary in fact does not violate Fourth Amendment. U.S.C.A. Const.Amend. 4.

#### 25. Searches and Seizures ¶198

State has burden to prove that consent given to search was voluntary. U.S.C.A. Const.Amend. 4.

#### 26. Searches and Seizures ¶201

Voluntariness of consent to search is question of fact to be determined from

totality of all circumstances. U.S.C.A. Const.Amend. 4.

#### 27. Criminal Law ¶1158(2)

Court of Appeals deferentially reviews a trial court's finding of voluntary consent to search, and will disturb it only if defendant demonstrates that there has been clear error. U.S.C.A. Const.Amend. 4.

#### 28. Searches and Seizures ¶184

Fact that apartment occupant was under arrest when she gave consent to search did not preclude finding that consent to search premises was voluntary. U.S.C.A. Const.Amend. 4.

#### 29. Searches and Seizures ¶184

State carried its burden of proving that apartment occupant's consent to search was voluntary, even though occupant was under arrest, where there was no evidence that officers continued to brandish their weapons once suspects were arrested, occupant's infant son was placed near her to alleviate her fears for him, occupant was allowed to get up from floor six or seven minutes after arrest, occupant was allowed to drink coffee and use bathroom, and occupant signed straightforward consent-to-search form. U.S.C.A. Const.Amend. 4.

#### 30. Searches and Seizures ¶164

Defendant lacked standing to contest constitutionality of search of purse, even though purse belonged to person with whom he had intimate relationship, and purse and its contents were in his home when challenged search occurred, where there was no evidence that defendant owned purse, had ever sought or been given access to purse, or had ever put any of his own effects in it. U.S.C.A. Const.Amend. 4.

#### 31. Searches and Seizures ¶162

Defendant's privacy interest in common residence does not necessarily extend to privacy interest in every object located inside that residence. U.S.C.A. Const.Amend. 4.

#### 32. Robbery ¶24.1(4)

Substantial evidence existed upon which jury could reasonably find that defendant solicited, requested, commanded,

encouraged, or intentionally aided codefendant in aggravated robbery of jewelry store with requisite intent, although there was conflicting evidence presented in support of defense theory that codefendants were innocent victims of setup by others, and defendant had receipt issued in another state by gas station at which another alleged coperpetrator's son worked. U.C.A. 1953, 76-2-202, 76-6-302(1).

#### 33. Criminal Law ¶1208.6(4)

Defendant's sentence for armed robbery conviction was properly enhanced under use of firearm statute, even though offense had already been enhanced to aggravated robbery due to use of deadly weapon during offense. U.C.A. 1953, 76-3-203(1), 76-6-302(1)(a), (2).

Samuel Alba (argued), Sally B. McMinimie, Prince, Yeates & Geldzahler, Salt Lake City, for defendants and appellants.

R. Paul Van Dam, Atty. Gen., Dan Larsen (argued), Asst. Atty. Gen., Salt Lake City, for plaintiff and respondent.

Before BENCH, JACKSON and BULLOCK<sup>1</sup>, JJ.

#### OPINION

JACKSON, Judge:

Defendant Charles Webb challenges his jury conviction of aggravated robbery, a first degree felony in violation of Utah Code Ann. § 76-6-302 (1978). He raises the following substantial issues: denial of effective assistance of counsel; illegal search of his apartment and of his mate's purse; and insufficiency of the evidence. He also challenges the sentence imposed. We affirm the conviction, but remand the case with instructions to correct the sentence.

#### FACTS

In January 1987, Britt Martindale met defendant Webb and his girlfriend, Carolyn

1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah

Gregersen, while in the hospital. Through them, Britt met John Humphrey, who stayed at her home for several days mid-October 1987. At that time, Britt lived several blocks away from the apartment shared by Webb, Gregersen, her ten-year-old son, and their infant son.

At approximately 3:30 p.m. on October 21, 1987, a bearded man held the owner of a Salt Lake City jewelry store and a security guard at gunpoint while he robbed the store of cash, jewelry, and diamonds worth approximately \$40,000. The man had pulled a sawed-off shotgun from a cloth bag and directed the owner to put the contents of his safe and his display case into the bag. Before leaving, the robber advised the two men not to try to follow him because he had "another guy" with a gun waiting outside. At trial, the store owner and the security guard identified Webb's codefendant, John Humphrey, as the robber.

According to the testimony of Britt Martindale, Webb drove up to her Midvale Utah, home in a Cadillac at approximately 4:00 p.m. on October 21, 1987, with Gregersen in the passenger seat. Webb backed the car into Martindale's driveway, came into her home, and spoke to her briefly. He took the blanket off her bed and directed her to follow him outside to the car where he handed her one side of the blanket and instructed her to hold it up. Webb told Gregersen to push the trunk release button inside the car. The trunk lid opened and inside Martindale saw Humphrey, whom she had seen many times, including a day or two before October 21, 1987. Everyone went inside her apartment, where Humphrey went into the bathroom and immediately began shaving off his beard. Webb went back outside and returned shortly with a canvas bag and a sawed-off shotgun with black tape around the handle, which he handed to Britt. She put the shotgun, which she later identified as the shotgun seized from Webb's bedroom and put into evidence, on a shelf in

Code Ann. § 78-3-24(10) (Supp.1989).

her pantry, while Webb and Gregersen sat at her kitchen table and went through money, rings, and other jewelry, including loose diamonds, an opal, and a diamond watch, that they removed from the canvas bag. Webb asked Humphrey's permission to give the diamond watch to Gregersen, and he did so. Britt later identified the diamond watch taken from Gregersen's purse as the watch she saw Webb take from the canvas bag and give to Gregersen. Meanwhile, Humphrey walked back and forth between the bathroom and the kitchen while shaving, explaining how "he put the hotgun in some guy's face" and handed a guard who had walked in on them. Webb said everything "went great" and that it was a "little while before the cops showed up." He placed the jewels in a paper bag and put the canvas bag in a kitchen cupboard, telling Britt not to "mess with it" until he came back for it.

After approximately forty five minutes, Britt's husband, Russell Martindale, arrived. Ten minutes later, Webb, Humphrey, and Gregersen left the Martindale apartment with the paper bag. In a phone conversation with Britt shortly thereafter, Webb asked if she had seen "it" on the news. Webb returned to the Martindale home a few hours later and left again with the canvas bag, saying he was going to put it in the river. Webb and Humphrey returned again at approximately 11:30 p.m. After Britt gave Webb the shotgun, Webb and Humphrey left for Las Vegas along with Russell Martindale.

On November 2, 1987, the police learned at Britt might know something about the robbery. The police interviewed her on November 3. Based on the information she provided, the police obtained an arrest warrant for Webb, Gregersen, and Humphrey, who was staying at the Webb/Gregersen home that night. The warrant was executed by ten officers on the morning of November 4, 1987, at the apartment of Webb and Gregersen. Gregersen was arrested and handcuffed in the living room of the apartment. Her purse was searched for weapons incident to that arrest, and the diamond watch ultimately introduced by the State at trial was observed, however, it

was not seized until later at police headquarters. While Gregersen's arrest was going on in the living room area, Webb and Humphrey were arrested in separate bedrooms and then brought to the living room area. The police seized a shotgun from the bedroom in which Webb had been found. A short time later, Gregersen signed a consent to search form. During the ensuing search of the apartment, conducted after the trio had been taken away, the police seized miscellaneous paperwork, some clothing, and jewelry, including a ring from Gregersen's jewelry box. The diamond watch and the ring were both identified by the store owner as items stolen from him on October 21, 1987.

At their preliminary hearings in late November 1987, Webb and Humphrey were represented by two attorneys from the Salt Lake Legal Defenders Association. Webb's appointed counsel withdrew from representing Webb two weeks later at his arraignment and Webb privately retained attorney Ray Stoddard to represent him and Gregersen. Humphrey continued to be represented by appointed counsel from the Legal Defender Association, Lisa Remal. In early January 1988, Remal filed a motion to sever Humphrey's trial from Gregersen's. A motion in which Stoddard joined on behalf of Webb. Also in January 1988 on behalf of Webb and Gregersen, Stoddard filed a motion to suppress the use of the shotgun, ring, and diamond watch as evidence. After an evidentiary hearing, the motion to sever Gregersen's trial from that of Webb and Humphrey was granted and the suppression motion was denied.

In early March 1988, Stoddard filed a motion to withdraw as Webb's counsel partly based on unspecified "differences" between Webb and Stoddard about how Webb's defense should be conducted. A few days later Stoddard filed a motion to sever Webb's trial from Humphrey's on the ground that substantially more evidence would be adduced against Humphrey and defendant Webb would be prejudiced by the jury's inclination to find him guilty by association. The motion to withdraw as Webb's counsel was subsequently granted

and another attorney at the Salt Lake Legal Defenders Association, Brooke Wells, was appointed to represent Webb, while Stoddard continued to represent Gregersen. Webb's severance motion was not pursued by his new counsel. After Webb's supplemental motion to suppress evidence seized from the apartment was denied and discovery was conducted, the codefendants proceeded to a joint trial in early June 1988.

At trial, Britt testified to the events at her house on October 21, 1987, recited above. Russell Martindale admitted he had stolen a car at Webb's request that was used in the jewelry store robbery. He had turned this car over to Webb in Salt Lake City on October 20, 1987. He stated that Webb had promised to pay his rent in exchange for the stolen car, and he denied knowing what was to be done with it. A coat and hat found in that car matched the eyewitnesses' description of the clothing worn by the robber. Russell also testified that, the night of October 21, Webb told him he knew someone in Las Vegas who could get rid of the stuff Webb and Humphrey had stolen. Russell was granted immunity from prosecution for car theft in exchange for trial testimony concerning the robbery.

Webb and Humphrey both testified and presented a united defense, claiming that they had been set up by the Martindales. Webb stated that he had purchased the ring and watch from Britt on November 2, 1987, and had then given the ring to Gregersen for her birthday. He claimed to have been in Ely, Nevada, pursuing his occupation as a seller of gold, silver, and

diamonds when the robbery occurred, and he introduced a gas station receipt from there dated October 21, 1987, the day of the robbery. He admitted that he had pawned some diamonds in Las Vegas on October 22, 1987. Humphrey testified that he was staying at the Martindale apartment on October 21 and that Britt and Russell left the apartment about 3:00 p.m. that day and returned at 4:00 p.m. with a bearded man known to him only as Frank. Frank carried a large bundle wrapped in a quilt into the back bedroom. Humphrey said he never saw any weapon or jewelry. After "cleaning up" by shaving his own beard off, Humphrey left with Frank and Russell about 5:00 p.m. to go to Las Vegas, where they met up with Webb, and Frank left them. Humphrey stated he had seen Webb buy the diamond watch and a ring from Britt at her home on November 2.

After the jury found Webb and Humphrey guilty of aggravated robbery, Webb filed a motion for new trial claiming that his trial attorney, Wells, had inadequately represented him because of a conflict of interest created by her desire to not make her colleague at the Salt Lake Legal Defenders Association, Humphrey's counsel, "look bad." The trial court denied this motion, and Webb's appeal was pursued by newly appointed private counsel.

#### ASSISTANCE OF COUNSEL

[1, 2] Webb first claims he was denied the effective assistance of counsel guaranteed by the sixth amendment because his trial attorney jointly represented his and Humphrey's conflicting interests.<sup>2</sup> This

2 On appeal Webb contends for the first time that the right to counsel guaranteed in Article I section 12 of the Utah Constitution should be interpreted more expansively than the federal provision with the result that the state constitution would impose an affirmative duty on state trial judges to inquire into potential conflicts of interest any time codefendants are represented by members of the same law firm or public defender office. As explained at greater length in the portion of this opinion dealing with the fourth amendment claims in the absence of exceptional circumstances or plain error, an appellate court normally will not consider issues even constitutional ones that have not been presented first to the trial court for its

consideration and resolution. See *State v. Anderson*, 129 Utah Adv Rep 15, 16 (1990); *State v. Johnson*, 771 P 2d 326, 327-28 (Utah Ct App 1989). Even if that principle of appellate review were not a bar, we would still not resolve the state constitutional claim raised here. Webb's appellate counsel simply asserts that a different result should flow from the Utah constitutional guarantee without adequately briefing or arguing for different analyses under the state and federal constitutions. We need not address the important question of the parameters of the Utah constitutional guarantee under such circumstances. Eg., *State v. Wareham*, 772 P 2d 960, 966 (Utah 1989) (refusing to ad

claim is based on the multiple representation by the two codefendants at their joint trial by two attorneys from the Salt Lake Legal Defenders Association.<sup>3</sup>

[3] The sixth amendment right to effective assistance of counsel includes the right to counsel free from conflicts of interest. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Ordinarily, a claim of ineffective assistance of counsel must be analyzed under the two-pronged test set forth in *Strickland*. Under that standard, a criminal defendant must show both that his counsel's performance was deficient and that it prejudiced his defense. *Id.* at 687, 104 S.Ct. at 2064; *State v. Carter*, 776 P.2d 886, 893 (Utah 1989); *State v. Grueber*, 776 P.2d 70, 76 (Utah Ct.App.), cert. denied, 783 P.2d 53 (Utah 1989). However, a sixth amendment claim grounded on conflict of interest is a special subtype of ineffectiveness claim, which must be examined under a somewhat different standard that was first enunciated in pre-*Strickland* cases.

In *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), one attorney was appointed to represent three codefendants. Before trial, the attorney objected to his continued representation of all three and requested the appointment of separate counsel because of the possibility for conflict arising from his receipt of confidential information from the codefendants. The pretrial motion for separate counsel was denied before trial and a renewed motion was again denied just before the jury was empanelled. *Id.* at 484, 98 S.Ct. at 1179. Because these efforts "brought home to the court" the possibility

of inconsistent interests among the codefendants, the United States Supreme Court reversed the conviction because of the trial court's failure to appoint separate counsel or take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel. *Id.* The trial court's failure to investigate a potential conflict of interest based on multiple representation brought to its attention in a timely manner was presumed to be prejudicial, requiring reversal because it unconstitutionally endangered the right to counsel. *Id.* at 483-87, 98 S.Ct. at 1178-80.

The United States Supreme Court subsequently clarified that, although *Holloway* required trial judges to investigate any timely objections to multiple representation, the sixth amendment does not require state court judges to initiate sua sponte inquiries into the propriety of an attorney's representation of codefendants in every case:

Defense counsel have an ethical obligation to avoid conflicting representation and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in *Holloway*, *supra*, at 485-486, 98 S.Ct. at 1179, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An attorney representing two defendants in a criminal matter is in the

stance" to the argument that such an arrangement creates a possible conflict of interest, *id.*, 107 S.Ct. at 3120, it specifically assumed, without deciding, that two law partners are considered one attorney for purposes of sixth amendment analysis. *Id.* In his appeal and before the trial court, Webb has assumed that two attorneys from the same defender office constitute a single attorney for purposes of sixth amendment analysis, and the State has not contested the matter. We, therefore, proceed with our analysis of the ineffectiveness claim on the same basis, without considering or deciding this threshold question.

best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of trial." 435 U.S. at 485, 98 S.Ct. at 1179, quoting *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

*Cuyler v. Sullivan*, 446 U.S. 335, 346-47, 100 S.Ct. 1708, 1717-18, 64 L.Ed.2d 333 (1980) (footnotes omitted); accord *United States v. Burney*, 756 F.2d 787, 790-93 (10th Cir.1985) (sixth amendment does not require trial judge to initiate inquiry into potential conflict of interest when no party either objects to multiple representation or raises a conflict issue).

[4, 5] Noting that a possible conflict of interest inheres in almost every instance of multiple representation, the *Holloway* court explained that the *Holloway* presumption of prejudice from a possible conflict of interest is only appropriate in cases where the trial court did not provide an objecting defendant with an "opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Cuyler*, 446 U.S. at 348, 100 S.Ct. at 1718. The Court reaffirmed that multiple representation does not violate the sixth amendment unless it gives rise to a conflict of interest, holding that the possibility that multiple representation involved a conflict of interests is insufficient to impugn a criminal conviction. *Id.* at 350, 100 S.Ct. at 1719; see also *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987) (permitting joint representation of codefendants is not per se violation of sixth amendment guarantee of effective assistance of counsel); *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987). Therefore, a defendant who raises no objection at trial to multiple representation must show that an actual conflict of interest existed which adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 348, 100 S.Ct. at 1718; *Thomas*, 818 F.2d at 480; *Fitzpatrick v. McCormack*, 869 F.2d 1247 (9th Cir.1989). A defendant who

makes such a showing need not demonstrate prejudice to establish an ineffectiveness of counsel claim. *Cuyler*, 446 U.S. at 349-50, 100 S.Ct. at 1718-19; see *Thomas* 818 F.2d at 480 n. 3.

The reasons for presuming prejudice in conflict of interest cases meeting this standard, which is less rigorous than the *Strickland* test generally applicable to ineffectiveness counsel claims, was explained in *Strickland* itself:

In *Cuyler* ... [we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make an early inquiry in certain situations likely to give rise to conflicts ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above [i.e., actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

*Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719); accord *Burger*, 107 S.Ct. at 3120.

In this case, although no specific objection to joint representation of Webb and Humphrey by two public defenders was ever raised until after his conviction, Webb contends that the trial court knew or should have known about the possibility that the defenders were representing conflicting interests and that the trial court's failure, on its own motion, to either appoint Webb counsel who was not a public defender or inquire further into the issue before

dress appellant's claim of unconstitutionality in the absence of legal analysis and supporting authority; *State v. Lafferty*, 749 P.2d 1239, 1247 n. 5 (Utah 1988) (appellate court will not engage in constructing arguments "out of whole cloth" on behalf of defendants).

3. In *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), the United States Supreme Court considered a defendant's claim that the joint representation of himself and a coindicted at separate murder trials by two law partners denied him effective assistance of counsel because they had represented actually conflicting interests to his detriment. Although the Court noted that there was "much sub-



or during trial violated his sixth amendment right to effective assistance of counsel. See *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719; *United States v. Akinseye*, 802 F.2d 740, 744-46 (4th Cir.1986) (absent a specific conflict objection, trial court may assume that joint representation does not involve any conflict unless court knows or has reason to know that particular conflict exists), *cert. denied sub nom. Ayodeji v. United States*, 482 U.S. 916, 107 S.Ct. 3190, 96 L.Ed.2d 678 (1987). Reversal and remand for a new trial are required as in *Holloway*, Webb argues, because he has demonstrated a potential conflict of interest, from which prejudice must be presumed.

In support of his argument that the trial judge violated a sixth amendment duty to investigate further the potential conflict of interest, Webb contends that the following were sufficient to bring to the trial court's attention the potential for conflict arising from joint representation of him and Humphrey by two attorneys from the Salt Lake Legal Defenders Association (SLLDA): (1) his March 1988 motion to sever his trial from that of Humphrey; (2) the trial court's appointment of the two SLLDA attorneys to represent two codefendants; and (3) his post-conviction motion for new trial.

[6] In *Cuyler*, as noted above, the United States Supreme Court rejected the proposition that the representation of codefendants by a single attorney was, in and of itself, a "special circumstance" from which a trial judge "knows or reasonably should know that a particular conflict" of interest exists, thereby creating a duty on the court to inquire further into the conflict. In this case, therefore, the fact of representation of Webb and Humphrey by two SLLDA

attorneys is alone insufficient to impose such a duty on the trial judge. See *State v. Bell*, 90 N.J. 163, 447 A.2d 525 (1982) (no presumption of prejudice arising solely from multiple representation of codefendants by attorneys from same public defender office).

[7-9] We reach the same conclusion regarding the duty of the trial judge in this case even when the codefendants' joint representation at trial by SLLDA lawyers is viewed in light of the fact that the case file contained Webb's pretrial motion to sever his trial from Humphrey's. At the time the motion was filed, the codefendants were not represented by the two defenders. Webb was still represented by a private retained attorney and Humphrey was represented by a public defender. After Wells was appointed to replace Stoddard as Webb's counsel nearly three months before trial, the codefendants did nothing to alert the trial judge to a potential or actual conflict between them.<sup>4</sup> There is nothing in this record to suggest that the trial judge actually knew of the vague, general assertions in the earlier severance motion about the difference in the quantum of evidence that would allegedly be presented at trial against the codefendants. No hearing on the severance motion was requested or held; likewise, no ruling on the motion was requested or obtained. In the absence of other facts or circumstances that should reasonably bring a conflict of interests between codefendants to the trial court's attention, we decline to hold that, for purposes of invoking the rule set forth in *Holloway* and *Cuyler*, a trial judge "knows or reasonably should know" before or at trial of a conflict suggested in an abandoned pretrial severance motion. By the time of trial, the trial judge in this case

of him was unconstitutional. The "conflict of interest" referred to by the caption on Humphrey's motions appears to be Humphrey's disagreement with counsel over the handling of this pretrial identification issue, which had already been argued to, but rejected by, the trial court. In light of the court's resolution of Humphrey's claims, these motions were insufficient to alert the trial court to any potential conflict of interests.

could reasonably assume that, in the face of the State's evidence linking Webb and Humphrey and in spite of the victims' identification of Humphrey, Webb's trial counsel had made a tactical decision not to pursue a defense based on disassociating Webb from Humphrey but to press a united defense—i.e., that both codefendants were framed by the Martindales and that the identification of Humphrey by the robbery victims was erroneous—at one trial. There was nothing at the trial itself suggesting to the trial judge that Webb's legal representation was in any way compromised by the other public defender's representation of Humphrey. On the contrary, the judge could see at trial that Webb was actively participating in the joint defense, an affirmative indication that Webb considered the codefendants' interests as being in harmony, not in conflict.

[10] Finally, we reject out-of-hand Webb's absurd contention that his post-conviction motion for new trial was the timely "objection at trial" contemplated by *Holloway*, a proposition for which he cites no supporting authority. There is no question that Webb knew of the alleged conflict of which he now complains no later than at trial. Although his motion for new trial could be regarded as sufficient to preserve for consideration in this direct appeal his ineffectiveness of counsel claim arising from counsel's representation of purportedly conflicting interests, see *People v. Precup*, 73 Ill.2d 7, 21 Ill.Dec. 863, 382 N.E.2d 227 (1978); but see *Armstrong v. People*, 701 P.2d 17, 21 (Colo.1985) (issue can be considered on direct appeal even if not raised in new trial motion), it was untimely for purposes of invoking the *Holloway* automatic reversal rule, which is based on a trial judge's failure to act once on notice that there was a possible conflict of interests between jointly represented codefendants.

Unlike the pretrial and trial objections of the defendant in *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178, described by the Court as "focused explicitly on the probable risk of a conflict of interests" between defendants represented by a single defense attorney,

the record in this case discloses an insufficient basis on which to hold that the trial court reasonably should have known before or at trial that the two SLLDA attorneys were representing codefendants with conflicting interests. We therefore conclude that the sixth amendment imposed no affirmative duty on the trial judge to act spontaneously and appoint Webb a non-SLLD attorney or inquire into the propriety of the representation of the codefendants by two public defenders from the same office.

[11] Because the alleged conflict in this case was not adequately raised in the trial court until after his conviction, Webb cannot succeed on his sixth amendment ineffectiveness of counsel claim only if he demonstrates both that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. See *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. at 2067; *United States v. Dressel*, 742 F.2d 1256, 1259-60 (10th Cir.1984). We conclude that Webb has failed to sustain his burden on both points.

[12, 13] In order to show an actual conflict of interest existed, a defendant must point to specific instances in the record to suggest an actual conflict or impairment of his or her interests. *Thomas*, 818 F.2d at 481; *Burney*, 756 F.2d at 792. There is no violation where the conflict is irrelevant or merely hypothetical; there must be an actual, significant conflict. *Thomas*, 818 F.2d at 481.

Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney "made a choice between possible alternative courses of action. . . . If he did not make such a choice, the conflict remained hypothetical." . . . . An actual conflict of interest exists when the respective defenses of multiple defendants are inconsistent, i.e., if "introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing."

*United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir.) (citations omitted), *cert. denied*,

4. In his reply brief, Webb also alludes to Humphrey's April and May 1988 handwritten pro se motions, both captioned "Motions for Conflict of Interest," as providing sufficient notice to the trial court of a potential conflict arising from representation of the codefendants by the two public defenders. In his motion, Humphrey asserted that Webb would be deprived of a fair trial if the robbery victims were allowed to identify Humphrey as the robber at trial since, Humphrey claimed, their pretrial identification

464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Until a defendant shows an actual conflict, "he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719.

[14] Webb asserts that an actual conflict was demonstrated by his trial attorney's pursuit of a united defense with Humphrey at a joint trial "in spite of the evidence and Webb's desire to impeach the testimony of his codefendant." We disagree. This is not a case in which the evidence produced against Webb was wholly circumstantial, while that against his codefendant was direct. Nor is this a case in which the codefendants' interests actually conflicted because of a substantial disparity of evidence incriminating each defendant, as in *Armstrong*, 701 P.2d at 22. Although there was eyewitness victim testimony identifying Humphrey, not Webb, as the robber in the store, the Martindales testified to Webb's direct involvement before and immediately after the crime. The two codefendants took the stand and gave entirely consistent, corroborative testimony to support their claim that the Martindales were the real culprits while they were only patsies. Webb's counsel aggressively challenged the reliability of the robbery victims' identification of Humphrey as the robber.

Under these circumstances, we are convinced that counsel's loyalty was not divided between Webb and a codefendant with actual conflicting interests. See *United States v. Cantu*, 786 F.2d 712 (5th Cir.) (per curiam) (no conflict where jointly represented codefendants charged with conspiracy to file false tax returns pursued joint defense claiming that neither party filed fraudulent returns), cert. denied, 479 U.S. 847, 107 S.Ct. 169, 93 L.Ed.2d 106 (1986); *Mers*, 701 F.2d at 1329 (no conflict where codefendants pressed same defense and corroborated each other); *Government of Canal Zone v. Hodges*, 589 F.2d 207 (5th Cir.) (joint alibi defense), cert. denied, 441 U.S. 948, 99 S.Ct. 2173, 60 L.Ed.2d 1052 (1979); *Wright v. State*, 442 So.2d 301 (Fla. Dist.Ct.App.1983) (no conflict of interest

where jointly tried codefendants in rape trial both used consent defense).

[15] Furthermore, even if we were to conclude that the difference in the nature of the evidence adduced at trial demonstrated an actual conflict of interest, Webb has failed to demonstrate that it resulted in any adverse effect on his counsel's performance. He merely asserts that the conflict caused his attorney not to pursue a nonunited defense at a separate trial and assumes that this is sufficient to demonstrate an adverse effect. Faced with such a claim of omission, however, a reviewing court must determine from the record (1) whether the arguments or actions allegedly omitted would likely have been made by other counsel, and (2) whether there was a tactical reason (other than the asserted conflict) for the omission. *People v. Easley*, 46 Cal.3d 712, 759 P.2d 490, 498-99, 250 Cal.Rptr. 855 (1988).

There is absolutely nothing in the record to suggest that counsel's choice of the united defense strategy, which Webb apparently supported enthusiastically until it produced an unfavorable verdict, was in any way prompted by a desire or effort to bolster Humphrey's defense at Webb's expense. Any reasonably competent counsel representing Webb but not Humphrey would not have chosen any different defense strategy. Webb would likely have gained nothing by abandoning the common defense and challenging Humphrey's credibility at a separate trial. On the record before us, counsel simply had no other defense options to pursue, and Webb has suggested none. The frame-up defense, coupled with an attack on the robbery victims' ability to make a reliable identification of Humphrey, was the only viable defense tactic available to Webb in light of the State's evidence, including Britt Martindale's testimony placing Humphrey and Webb together at her home with the jewelry and shotgun shortly after the robbery. Therefore, there was a tactical reason, other than multiple representation of Webb and Humphrey, underlying the decision to pursue the united defense strategy at a joint trial.

## STATE v. WEBB

Cite as 790 P.2d 65 (Utah App. 1990)

Utah

As the United States Supreme Court pointed out in rejecting any per se rule that would prohibit a single attorney from ever representing codefendants, "in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" *Hollway*, 435 U.S. at 482-83, 98 S.Ct. at 1177-78 (quoting *Glasser v. United States*, 315 U.S. 60, 92, 62 S.Ct. 457, 475, 86 L.Ed. 680 (1942) (Frankfurter, J., dissenting)).

Because Webb has failed to demonstrate an actual conflict of interest which adversely affected his attorney's performance, we reject his claim of ineffective counsel and conclude that the trial court properly denied Webb's motion for a new trial.

### MOTION TO SUPPRESS

#### A. Execution of Arrest Warrants

[16] We next consider Webb's attacks on the trial court's denial of his motion to suppress the shotgun, the ring, and the diamond watch. He first contends that the seizure of these items violated his fourth amendment rights because the arrest warrants for him, Humphrey, and Gregersen, which form the basis for the lawful presence of the police officers in the apartment, were not executed in the manner prescribed by the prior demand requirements in Utah Code Ann. §§ 77-7-6, -8 (1982).<sup>5</sup> In essence, Webb argues that any search of the apartment following an arrest in which the arrest warrants were executed in a manner violating these statutes is per se unreasonable under the fourth amendment,

#### 5. Section 77-7-8 provides:

To make an arrest, a private person, if the offense is a felony, and in all cases, a peace officer, may break the door or window of the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before breaking under the exceptions in section 77-7-6 or where there is reason to believe evidence will be secreted or destroyed.

requiring application of the exclusion rule.

However, this statutory noncompliance issue was not raised or argued to the court as one of the grounds in support of defendant's motion to suppress, either before or at trial. As a result, the trial court made no ruling on whether sections 77-7-6 and -8 were violated and it made no findings to resolve discrepancies in the testimony at the suppression hearing on facts and questions critical to the statutory noncompliance issue, such as whether demand and explanation were actually given, whether there was a "breaking" of the apartment door, and whether there were facts corroborating an exception to the demand requirements.

As the Utah appellate courts have reiterated many times, we generally will consider an issue, even a constitutional one, which the appellant raises on appeal for the first time. *E.g.*, *State v. Anderson*, 106 Utah Adv.Rep. 15, 16 (1990); *Jolinet Cook*, 115 Utah Adv.Rep. 17, 19 (1989) (civ. and unusual punishment claim); *State v. Chancellor*, 704 P.2d 579, 580 (Utah 1985) (per curiam) (probable cause to stop hicle); *State v. Sparks*, 672 P.2d 92, 93 (Utah 1983) (speedy trial right); *State v. M.S.*, 781 P.2d 1289 (Utah Ct.App.1985) (constitutionality of statute). This principle of appellate review has been applied to fourth amendment challenges to the admission of evidence: "[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence at the trial court, an appellate court will not consider that ground on appeal." *State v. Carter*, 707 P.2d 656, 660 (Utah 1985); *accord State v. Constantino*, 732 P.2d 11

Insofar as it is relevant to the situation presented in this case, section 77-7-6 does away with the prior demand and explanation requirements when

(1) There is reason to believe the notice of arrest endangers the life or safety of the officer or another person or will likely enable the person being arrested to escape[.]

A similar argument involving police compliance with the knock-and-announce statute applicable to executions of search warrants, Utah Code Ann. § 77-23-10(2) (1982), was considered by the Utah Supreme Court in *State v. Buck*, 750 P.2d 700 (Utah 1988).



126 (Utah 1987) (per curiam); *State v. Johnson*, 771 P.2d 326, 328 (Utah Ct.App. 1989). The *Carter* court relied on *State v. Lee*, 633 P.2d 48 (Utah), cert. denied, 454 U.S. 1057, 102 S.Ct. 606, 70 L.Ed.2d 595 (1981), in which it pointed out that suppression motions should be supported by precise averments, not conclusory generalizations, and held that, in the absence of special circumstances, the appellate court will not rule on available grounds not addressed in the trial court. *Lee*, 633 P.2d at 53; see Utah R.Crim.P. 12(a) (grounds for a motion must be stated "with particularity"). "[T]o entertain the point now would be to sanction the practice of withholding positions that should properly be presented to the trial court but which may be withheld for purposes of seeking a reversal on appeal and a new trial or dismissal." *Carter*, 707 P.2d at 661 (quoting *Lee*, 633 P.2d at 53).

Exceptions to this general rule consist of those cases in which there are "exceptional circumstances" for the failure to raise the issue below, *Jolivet*, 115 Utah Adv.Rep. at 19, or cases where the plain error rule is applicable, *Anderson*, 129 Utah Adv.Rep. at 16; *State v. Gibbons*, 740 P.2d 1309, 1311 (Utah 1987); cf. *State v. Breckenridge*, 688 P.2d 440, 443 (Utah 1983) (stating that the exception applies where a "liberty interest" is at stake). In this case, there is nothing in the record to suggest that the statutory noncompliance ground now asserted by Webb was unknown or unavailable to him before or at trial. He has not contended that the plain error exception should apply or that any special circumstances justify his failure to present this particular ground for the motion to suppress to the trial court, nor do we perceive any in the record. We, therefore, will not consider the statutory noncompliance challenge to the validity of the seizure of the evidence, which he raises here for the first time. See *Carter*, 707 P.2d at 661.

6. A warrantless seizure justified on the basis of the "plain view" exception requires: (1) the lawful presence of the officer; (2) evidence in plain view; and (3) evidence which is clearly incriminating. *State v. Kelly*, 718 P.2d 385, 389 (Utah 1986); *State v. Holmes*, 774 P.2d 506, 510 (Utah

## B. Shotgun

[17] Webb contends that, even if the officers were lawfully present in his apartment for purposes of making the arrests, the warrantless search of the bedroom in which he was arrested, which led to the seizure of the shotgun, was unlawful because it was not incident to his arrest. The factual premise for this argument is that the gun was not observed and seized until the officers re-entered that bedroom after Webb had been arrested and taken from the room. Once he was taken from the bedroom in handcuffs, Webb argues, the bedroom was not "an area within his immediate control," *State v. Harris*, 671 P.2d 175, 180 (Utah 1983), that could be re-entered and searched for weapons. The State accepts this factual premise and contends that the shotgun was seized in plain view<sup>6</sup> when the police officers, after arresting Webb pursuant to an arrest warrant, re-entered the bedroom as part of a "protective sweep" to search for other dangerous persons on the premises, see *Maryland v. Buie*, — U.S. —, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), prior to conducting their intensive search of the apartment pursuant to Gregersen's consent.

We, however, have carefully reviewed the record of the suppression hearings and find insufficient support in the evidence for Webb's version of the events leading to the seizure of the shotgun. Detective Dalling, who was one of the officers who arrested Webb and then was involved in securing the written consent from Gregersen, made clear that the shotgun had already been located prior to her consent to search the entire premises, although he was not the officer who located the shotgun. In response to questioning from attorney Stoddard—who appeared confused about whether Webb and Humphrey had been found in the same bedroom, but in a different bedroom from the one in which the

Ct.App.1989). Webb does not dispute the presence of the last two elements of the plain view doctrine. Instead, he asserts only that the re-entry of the police into his bedroom once he had been removed from it was unlawful.

## STATE v. WEBB

Cite as 790 P.2d 65 (Utah App. 1990)

Utah

shotgun was found—Detective Dalling also indicated that he had located Webb prior to the shotgun being found. Counsel asked no further questions on this point to clarify which of several officers present in Webb's bedroom to arrest him had located the shotgun and whether it had been located during the time the officers were lawfully present to effectuate the arrest, even if it was not physically seized until Webb was secured and removed to another room. There is simply no evidence that, with Webb in handcuffs, all the arresting officers left the room totally unaware of the shotgun and then returned to that room later and discovered the shotgun in plain view for the first time. From the testimony presented, it appears that the shotgun was located while the officers were lawfully present in the room to arrest Webb. We therefore reject Webb's contentions and conclude that, on the evidence before it, the trial court did not err in admitting the shotgun into evidence.

## C. Jewelry

Webb next challenges the admission into evidence of the diamond watch and the ring. He disputes the legality of the warrantless search of Gregersen's purse, which ultimately resulted in the seizure of the diamond watch, by asserting that it was not incident to her lawful arrest since she was already handcuffed when the purse was searched. He also contends that the subsequent warrantless search of the apartment, during which the ring was found in a jewelry box on the dresser in the master bedroom, was illegal because Gregersen did not voluntarily consent to it.<sup>7</sup>

The State responds that Webb failed to establish his standing to raise either of these two distinct fourth amendment claims and that, even if we conclude Webb has standing to challenge the admissibility of the ring, he loses on the merits because Gregersen voluntarily consented to the search of the apartment.

At the first suppression hearing, Webb's counsel contended that the search of Gre-

gersen's purse was not incident to her arrest and that Gregersen's written consent to search the premises was involuntary because she was coerced and undressed, mostly out of fear for her children's safety. The State then went forward with testimony from the arresting officers concerning the facts surrounding the arrests, the search of Gregersen's purse in conjunction with her arrest, the subsequent obtaining of Gregersen's written consent to search the entire premises.

According to the officers' testimony they encountered Gregersen immediately upon entering the apartment. She was placed under arrest, handcuffed, and required to kneel on the living room floor. Her purse, apparently lying nearby, was searched for weapons by one of the arresting officers. Her infant son was placed in a small crib on the floor next to her. She remained in the living room, agitated and crying, for six or seven minutes while the officers arrested the other two suspects. Gregersen was then allowed to stand and move to a chair at the kitchen table. Her older son called her sister to come and take custody of the children. The officers then began asking her questions. After determining that she paid rent on the apartment, they requested her consent to search the apartment, explaining that they were looking for weapons and for jewelry taken in the robbery and that she did not need to sign the consent form. She was also permitted to smoke, drink coffee, and use the bathroom. When Gregersen took the stand, she stated that her jewelry was kept in her jewelry box on her dresser in the master bedroom, but she did not dispute the arresting officer's testimony concerning the search of her purse. She also claimed that she was upset by the police's armed entry, that the police would not let her hold her crying infant son, and that she did not remember signing any consent form or talking to the officers about a search of the premises.

ment or the master bedroom in which the jewelry box was located.

7. Webb does not contend that Gregersen lacked the power to consent to the search of the apart-

In his supplemental motion to suppress, Webb renewed his challenge to the legality of the search of the premises that led to the discovery of the ring. This time, his motion was grounded on Gregersen's claim that the signature on the consent form was not, in fact, her signature. At the start of the evidentiary hearing, Webb himself took the stand as the moving party for the limited purpose, according to his counsel, of "establishing his residence and standing to bring [the] motion." In testimony that the State did not controvert, Webb stated that he resided at the apartment he shared with Gregersen, along with their infant child; he was actually living there on the date the arrest warrants were executed and the premises searched; and he monetarily contributed to the support of their household by paying half the utility bills and over half the rent. He did not testify to any interest in the purse searched or in the diamond watch seized from that purse.

[18,19] Because fourth amendment rights are personal rights which may not be vicariously asserted, *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969), the proponent of a motion to suppress has the burden of establishing that his own fourth amendment rights were violated by the challenged search or seizure. *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (1978). A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed. *Id.* at 134, 99 S.Ct. at 425. "And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." *Id.* Therefore, the central inquiry in any suppression hearing grounded on a purportedly illegal search is whether the defendant challenging the admission of evidence has shown a "legitimate expectation of privacy in the invaded place." *United States v. Salvucci*, 448 U.S. 83, 91-92, 100 S.Ct. 2547, 2552-53, 65

L.Ed.2d 619 (1980) (quoting *Rakas*, 439 U.S. at 140, 99 S.Ct. at 428). The inquiry is the same whether the challenged search is of premises, such as the apartment in *Salvucci*, or of a tangible object, such as the glove box in *Rakas* or the purse in *Rawlings v. Kentucky*, 448 U.S. 98 at 105, 100 S.Ct. 2556 at 2561, 65 L.Ed.2d 633 (1980). See also *United States v. Knox*, 839 F.2d 285 (6th Cir.), cert. denied, — U.S. —, 109 S.Ct. 1742, 104 L.Ed.2d 179 (1988) (search of travel bags).

[20-22] As this court recently pointed out, there is no bright line test to use in making this fact-sensitive determination. *State v. Grueber*, 776 P.2d 70, 73 (Utah Ct.App.) (quoting *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430), cert. denied, 783 P.2d 53 (Utah 1989). A legitimate expectation of privacy incorporates two elements: first, whether the defendant "exhibited an actual (subjective) expectation [of privacy]," and second, whether that subjective expectation is "one that society is prepared to recognize as reasonable." *Knox*, 839 F.2d at 293 (quoting *United States v. Tolbert*, 692 F.2d 1041, 1044 (6th Cir.1982), cert. denied, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983)); accord *California v. Ciraolo*, 476 U.S. 207, 212, 106 S.Ct. 1809, 1812, 90 L.Ed.2d 210 (1986). Factors relevant to this inquiry include whether the defendant had any possessory or proprietary interest in the place searched or the item seized in the challenged search; was legitimately on the premises; had the right to exclude others from that place; exhibited a subjective expectation that the place would remain free from governmental invasion; or took normal precautions to maintain his privacy. *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir.1981), cert. denied, 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 140 (1982). A defendant's ownership or possession of an item seized in the allegedly unlawful search is not determinative of whether that individual's fourth amendment privacy rights in the place searched have been infringed. *Salvucci*, 448 U.S. at 91, 100 S.Ct. at 2553; see *Rakas*, 439 U.S. at 144 n. 12, 99 S.Ct. at 430 n. 12. On the other hand, a

defendant who establishes a privacy interest in the place searched sufficient to contest the legality of that search, in order to suppress evidence seized as a product of it, is not deprived of fourth amendment standing to assert that claim merely because another person actually owns either the evidentiary items actually seized or the personal effect in which the seized items were found. See, e.g., *Alderman*, 394 U.S. at 176-77, 89 S.Ct. at 968-69; *United States v. Perez*, 700 F.2d 1232 (8th Cir.1983), cert. denied, 468 U.S. 1217, 104 S.Ct. 3587, 82 L.Ed.2d 884 (1984); *United States v. Aikens*, 685 F.Supp. 732, 736 (D.Ha.1988); *People v. Koury*, 214 Cal.App.3d 676, 262 Cal.Rptr. 870, 874-75 (1989); *People v. Whisler*, 724 P.2d 648, 650-51 (Colo.1986) (Lohr, J., concurring specially); see generally 4 W. LaFave, *Search and Seizure* § 11.3(a) (1987).

In *Perez*, the court concluded that the defendant had a reasonable expectation of privacy in his own house sufficient to allow him to challenge the constitutionality of the search of the house—with the goal of suppressing incriminating items seized during the course of that challenged search—even though the incriminating items were found in a search of handbags and luggage belonging to his houseguests. *Perez*, 700 F.2d at 1236. The United States Supreme Court explained the rationale for such a result in *Alderman*, 394 U.S. at 176-77, 89 S.Ct. at 968-69:

If the police make an unwarranted search of a house and seize tangible property belonging to third parties . . . the homeowner may object to its use against him, not because he had any interest in the seized items as "effects" protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment.

Webb's fourth amendment claim concerning the ring is similar to that of defendant *Perez*. See *Perez*, 700 F.2d at 1235-36. Webb contends his personal privacy rights were violated by a warrantless search of his home; consequently, evidence found in that search (i.e., the ring in the jewelry

box) should be suppressed. To succeed, he must first show a legitimate expectation of privacy in the "invaded place," i.e., the apartment, as required by *Salvucci*.

His claim concerning the diamond watch, however, is very different. He does not contend that the search of Gregersen's purse was the fruit of the purportedly unconstitutional search of his apartment or any part thereof. In this case, such a contention would be untenable since the search of the purse in conjunction with Gregersen's arrest preceded the independently challenged search of the apartment. Instead, Webb seeks to challenge a separate search of a tangible object that took place in the living room of the apartment while the police officers were legally present to execute an unchallenged arrest warrant. Thus, insofar as Webb's motion to suppress the diamond watch is concerned, the "invaded place" in which Webb must preliminarily show a legitimate expectation of privacy is the purse, not the apartment.

[23] With this important distinction in mind, we conclude that Webb has standing to contest the legality of the extensive, two-hour search of the apartment. The state did not controvert his testimony that he actually resided there with Gregersen and their child, in a "common law marriage," and that he contributed to household expenses, including rent. From this it can reasonably be inferred that, as a co-resident, he had the right to exclude all others except Gregersen from the apartment. He identified the master bedroom, in which the jewelry box containing the ring was located, as "our" bedroom, implying that it was used by him and Gregersen. We conclude that Webb established his legitimate and reasonable expectation of privacy in the apartment as his home, including the master bedroom. Because the challenged governmental search of the master bedroom and the rest of the apartment infringed on Webb's personal fourth amendment rights, he may contest the legality of that search with the goal of preventing the admission of the ring as evidence.

[24-27] On the merits of that issue, however, Webb fails. A warrantless search conducted pursuant to a consent that is voluntary in fact does not violate the fourth amendment. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). It is the State's burden to prove that consent given to a search was voluntary. *United States v. Mendenhall*, 446 U.S. 544, 557, 100 S.Ct. 1870, 1879, 64 L.Ed.2d 497 (1980); *State v. Sierra*, 754 P.2d 972, 981 (Utah Ct.App. 1988). Voluntariness is a question of fact to be determined from the totality of all the circumstances. *Mendenhall*, 446 U.S. at 557, 100 S.Ct. at 1878; *United States v. Carson*, 793 F.2d 1141, 1149 (10th Cir. 1986). We deferentially review a trial court's finding of voluntary consent, like other factual determinations underlying the denial of a motion to suppress, disturbing it only if the appellant demonstrates that there has been clear error. *United States v. Miller*, 589 F.2d 1117, 1130 (1st Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979); *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987). We do so because of the trial court's more favorable position to assess the credibility of witnesses and resolve conflicting testimony. *Ashe*, 745 P.2d at 1258; *State v. Holmes*, 774 P.2d 506, 509 (Utah Ct.App. 1989). A finding is clearly erroneous if "it is 'against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.'" *State v. Goodman*, 763 P.2d 786 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). However, in evaluating whether a finding of voluntary consent is clearly erroneous, we are not unmindful of the analysis in which a reviewing court must engage to insure that the State has met its burden of proof on this issue:

(1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of funda-

mental constitutional rights and there must be convincing evidence that such rights were waived.

*United States v. Abbott*, 546 F.2d 883, 885 (10th Cir.1977) (quoting *Villano v. United States*, 310 F.2d 680, 684 (10th Cir.1962)); accord *Carson*, 793 F.2d at 1150; *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988).

[28, 29] When the evidence presented to the trial court is measured against these standards, we are satisfied that the State carried its burden of proof on the voluntariness question, and we conclude that there is no clear error here. The fact that Gregersen was under arrest when her consent was given, although one relevant factor, does not preclude a finding that her consent to search the premises was voluntary. See *United States v. Castillo*, 866 F.2d 1071, 1081-82 (9th Cir.1988). Gregersen was concerned for her children and upset by the officers' armed entry into her home, but there is no evidence that the officers continued to brandish their weapons once the three suspects were arrested. Her infant son was placed near her to alleviate her fears for him. Six or seven minutes after her arrest, she was allowed to get up from the floor and move to the kitchen table, where the police began talking to her. The fact that she was allowed to drink coffee and use the bathroom upon request and that she was not denied any other reasonable request suggests that the atmosphere in the kitchen at that time was not coercive or threatening. An officer told her that they were looking for weapons and for jewelry taken in the robbery and asked for her consent, which he told her she did not have to give. He also explained that, if she did not consent to the warrantless search, it would not be conducted. Gregersen did not testify to any overt or implied threats to her own well-being or that of Webb or her children. There is no evidence that she merely acquiesced to the will of the police because she was already under arrest or because she believed they would do it anyway. She was shown the straightforward consent-to-search form by the officer who testified

that she read it. She asked no questions about it, and indicated no reservations about signing it. The preprinted form she signed contains statements that the police informed her of her constitutional right not to have a warrantless search made of her premises or property; she knew of her lawful right to refuse to consent to such a search; she willingly gave her permission to the officers "to conduct a complete search of the premises and property" located at her address and apartment number; and she did so "without any threats or promises of any kind." Gregersen never claimed that she signed the written consent form only out of fear or coercion or that she misunderstood it; instead, she testified that she did not remember signing the form or discussing the consent with the officers. Under the totality of the circumstances, we cannot say that the finding of voluntary consent to the search of the premises was clearly erroneous. Thus, the trial court properly denied Webb's motion to suppress the ring found in the search of the apartment.

[30, 31] Returning to the matter of Webb's standing to contest the constitutionality of the prior search of the purse, we conclude that Webb failed to establish that he had a legitimate expectation of privacy in the purse at the time it was searched. There is no evidence, nor even any argument, that Webb owned the purse, that he had ever sought or been given access to Gregersen's purse, or that he had ever put any of his own effects in it. See *Rawlings*, 448 U.S. at 104-06, 100 S.Ct. at 2561-62. At the time of the search, the purse was in proximity to Gregersen in the living room area, while Webb was in another room. Thus, we are left with an object belonging to Webb's mate, in which Webb asserted no interest, which was searched in conjunction with her lawful arrest by police whose presence in the apartment was not the product of an illegal invasion of Webb's privacy rights, leading to the seizure of an

object in which Webb asserted no interest. The only evidence favoring Webb on this standing issue is that the purse belonged to a person with whom he had an intimate relationship and that the purse and its contents were in his home when the challenged search occurred.

Webb is in the same position as the defendant husband in *United States v. Garcia-Rosa*, 876 F.2d 209 (1st Cir.1989), a case relied on by the State and ignored by Webb. In *Garcia-Rosa*, the court noted that the United States Supreme Court has never recognized a standing doctrine that would permit even a spouse to vicariously assert the fourth amendment rights of the other spouse. The court of appeals held that the defendant husband had no standing to challenge the constitutionality of the search of a box belonging to his wife—which was lawfully seized in the couple's home while the police were lawfully present in the couple's master bedroom—because of the husband's failure to establish that he had a reasonable expectation of privacy in the box. *Id.* at 219. On that issue, the court in *Garcia-Rosa* did not consider as determinative the fact that the box was within the four walls of the couple's home when searched. The Colorado Supreme Court likewise concluded that a defendant had failed to establish a legitimate expectation of privacy in his girlfriend's suitcase, even though the suitcase was found in a consent search of the apartment in which they both lived. *Whisler*, 724 P.2d at 650. An expectation of privacy in a room, the Colorado court held, does not extend to another person's locked suitcase within that room. *Id.*

We likewise conclude that the fact that Gregersen's purse was within the confines of the apartment Webb shared with Gregersen, premises in which he had a legitimate expectation of privacy, is alone insufficient to establish his legitimate expectation of privacy in Gregersen's purse.<sup>8</sup> We

8. We recognize that the court in *Perez* summarily concluded that a defendant homeowner had a legitimate expectation of privacy in the luggage and handbags of his houseguests simply because he "should have been able to expect that any

personal property brought into the house by his overnight guests would be free from government intrusion." *Perez*, 700 F.2d at 1236. However, this conclusion appears to be dictum since *Perez* was contesting the admission of the con-

do not believe that a defendant's privacy interest in a common residence necessarily extends to a privacy interest in every object located inside that residence. See *United States v. Karo*, 468 U.S. 705, 725, 104 S.Ct. 3296, 3308, 82 L.Ed.2d 530 (1984) (O'Connor, J., concurring). Although it is possible that Webb could have shown a legitimate expectation of privacy in Gregersen's purse, he did not meet his burden of proof on this point.

Because Webb failed to show that his personal fourth amendment rights were infringed when the arresting officers invaded Gregersen's purse—conduct which we stress was not the product of any predicate illegality violating Webb's fourth amendment rights, see *Whisler*, 724 P.2d at 650-51 (Lohr, J., concurring); see also note 8, *supra*—he may not challenge the legality of the search of the purse in order to prevent admission of the diamond watch at trial.

#### SUFFICIENCY OF EVIDENCE

[32] Webb next challenges the sufficiency of the evidence to support his conviction. The standard of appellate review applicable to such a claim is well settled. We review the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict, *State v. Verde*, 770 P.2d 116, 117 (Utah 1989), reversing a jury conviction only when the evidence, so viewed, is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *Id.* at 124 (quoting *State v. Booker*, 709 P.2d 342, 345 (Utah 1985)); accord *State v. Cobb*, 774 P.2d 1123, 1128 (Utah 1989); *State v. Bell*, 780 P.2d 1271 (Utah Ct.App.1989). "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably

be made, our inquiry stops." *Booker*, 709 P.2d at 345.

Under Utah Code Ann. § 76-6-302(1) (1978), a person commits aggravated robbery if, in the course of committing robbery, he or she

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon;<sup>9</sup> or

(b) Causes serious bodily injury upon another.

One may be convicted as an accomplice if, acting with the mental state required for the commission of the offense, he or she "solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense." Utah Code Ann. § 76-2-202 (1978).

Webb does not challenge the sufficiency of the evidence to support the jury's finding of all the elements of an armed robbery in which Humphrey was the principal actor. Indeed, Webb does not really contend that the physical and testimonial evidence was insufficient to support a finding of his participation as an accomplice in the crime. Instead, he argues that we should disregard all the evidence that supports his conviction as an accomplice in this armed robbery, while his conflicting testimony and the physical evidence supporting his alibi defense, a receipt issued by a gas station in Ely, Nevada, at which Gregersen's son worked, should be viewed as if it were the only credible evidence presented at trial. This is not, however, our role. It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses. *Booker*, 709 P.2d at 345; *State v. Tolman*, 775 P.2d 422, 424 (Utah Ct.App.), *cert. denied*, 783 P.2d 53 (1989).

Russell Martindale testified that Webb had solicited him to steal the car eventually used as the getaway vehicle in the robbery, in which a sawed-off shotgun was used by the robber. Russell stole the car and

police who were lawfully present on the premises.

9. This provision was recently amended. See text at note 10, *infra*.

turned it over to Webb in Salt Lake City the day before the robbery. Clothing items matching the description of those worn by the robber were found in that car. The night of the robbery, Webb told Russell that he knew someone in Las Vegas who could get rid of the "stuff" he and Humphrey had stolen. According to Britt Martindale's testimony, Webb appeared at her home shortly after the robbery on October 21, 1987, with the man later identified as the robber in the trunk of his car. Webb removed a canvas bag and a sawed-off shotgun from his trunk and took them into her house, where he emptied the bag and sorted through currency and jewelry later found at Webb's apartment and identified by the store owner as some of the items stolen from him. Webb told Britt that everything had gone great and that the police had not shown up for a little while. He stashed the canvas bag in her kitchen and told her not to disturb it. When he returned later to retrieve the bag, he told her he planned to dispose of it in the river.

Viewing this testimony and all the evidence in the light most favorable to the jury's verdict, *Verde*, 770 P.2d at 124, we conclude there was substantial evidence upon which the jury could reasonably find that Webb solicited, requested, commanded, encouraged, or intentionally aided Humphrey in the aggravated robbery of the jewelry store with the requisite intent. That evidence is not so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that Webb committed the crime of aggravated robbery. Although there was conflicting evidence presented in support of the defense theory that Webb and Humphrey were innocent victims of a set-up by the Martindales, which, if believed, would have placed Webb in Ely, Nevada, the day before, and the day of, the robbery, the jury was not obligated to believe that evidence. See *State v. Smith*, 706 P.2d 1052, 1056 (Utah 1985).

#### OTHER CLAIMS OF TRIAL ERROR

After careful consideration of the other claimed errors on appeal, which Webb as-

serts require the reversal of his conviction and remand for a new trial, we conclude that they are meritless and that discussion of them is unnecessary. See *Carter*, 776 P.2d at 888.

#### SENTENCE

[33] The trial judge sentenced Webb to serve an indeterminate prison term of five years to life for the armed robbery conviction, a first degree felony. See Utah Code Ann. § 76-6-302(2) (1978); cf. Utah Code Ann. § 76-6-301 (1978) (robbery is a second degree felony). He also added one mandatory year for use of a firearm and a discretionary five years for use of a firearm, each to run consecutively to the sentence of five years to life. The court enhanced the penalties pursuant to Utah Code Ann. § 76-3-203(1) (Supp.1989), which provides:

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or facsimile or the representation of a firearm was used in the commission or the furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently[.]

The mandatory enhancement provision was added to the statute by 1977 Utah Laws, ch. 88, § 1; the discretionary enhancement provision was added by 1976 Utah Laws, ch. 9, § 1. This statute has been upheld as a valid exercise of legislative authority that neither creates a separate offense nor imposes double punishment for the same criminal act. *State v. Angus*, 581 P.2d 992, 995 (Utah 1978). As the *Angus* court explained, the legislature has the authority to increase the degree of a crime where "instruments of violence" were used in its commission, and to increase the punish-

ments of his houseguests' effects as the product of a purportedly unconstitutional search of his own home. He was not independently contesting the seizure or search of those effects by

nt for the use of specific deadly weapons considered more dangerous than others. *Id.* at 994-95. More recently, in *State v. Speer*, 750 P.2d 186, 192 (Utah 1988), the Utah Supreme Court reaffirmed that the enhancement is merely part of the penalty assessed on the specific type of weapon used. Before 1975, a person committed aggravated robbery pursuant to Utah Code Ann. § 76-6-302(1)(a) if he or she, in the course of committing a robbery, "use[d] a deadly weapon." Utah Laws 1973, ch. 196, § 76-6-302. The subsection was amended in 1975 to the form in effect at the time of Webb's conviction, i.e. a person committed aggravated robbery if he or she, in the course of committing robbery, "use[d] a firearm or a facsimile of a firearm, knife or facsimile of a knife or a deadly weapon." Utah Code Ann. § 76-6-302(1)(a) (1978).

Webb contends that, under accepted principles of statutory construction, the firearm enhancement statute does not apply at all to his armed robbery conviction because his sentence was already "enhanced" to at least a first degree felony as a result of the use of a firearm in the commission of the robbery. He asserts that the legislature's 1975 amendment of the armed robbery statute to specify use of a firearm, coupled with the subsequent enactment of the general enhancement provisions, leads to an ambiguity about whether the legislature intended the latter to apply to aggravated robbery. Such an ambiguity, he claims, should be resolved in favor of lenity.

See *State v. Egbert*, 748 P.2d 558, 562-63 (Utah 1987). Furthermore, the more specific statute governing robbery with the use of a firearm should control over the more general enhancement statute.

Webb relies exclusively on *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 Ed.2d 70 (1978), in which the United States Supreme Court refused to permit the sentencing court to enhance the penalty for bank robbery using the general federal

firearm enhancement statute, 18 U.S.C. § 924(c), where the statute setting forth the elements of bank robbery, 18 U.S.C. § 2113(a), included an enhancement provision for a bank robbery committed "by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d). We believe *Simpson* is distinguishable. First, the starting point for the court's construction of the federal statutes was its holding that section 924(c) created a separate offense from that in the underlying federal felony. *Simpson*, 435 U.S. at 10, 98 S.Ct. at 912. Thus, the *Simpson* court would have had to decide a double jeopardy issue if it had interpreted the general firearm enhancement statute as applicable to bank robberies committed using a firearm. In contrast, the Utah enhancement statute has been interpreted in *Angus* as not creating a separate offense from the underlying felony, thereby eliminating any double jeopardy concerns based on being tried twice for the same offense which, in any event, Webb has not raised. Second, the statutory scheme in *Simpson* involved a specific enhancement provision for bank robbery committed with a dangerous weapon. Here, the use of a firearm is one element of the substantive crime of armed robbery as defined in the version of section 76-6-302(1)(a) in effect when Webb was convicted, that section is not an enhancement provision. Third, the *Simpson* court relied heavily on the legislative intent it found in the public comments of the sponsor of section 924(c), the general enhancement statute for firearm use in federal felonies, to the effect that it would not apply to section 2113 armed bank robberies. Here, the parties have referred to nothing indicating that the legislature intended the general sentence enhancement provisions of section 76-6-303(1) to *not* apply to aggravated robbery committed with a firearm. Indeed, we find legislative intent to the contrary in the recent amendment of the aggravated robbery statute<sup>10</sup> that eliminated specific reference to a fire-

<sup>10</sup> section 76-6-302(1)(a) the legislature intended to single out aggravated robbery committed with a firearm for any kind of special sentencing treatment. See *State v. Bishop*, 753 P.2d 439, 486 (Utah 1988).

arm or knife and retained only the general term "dangerous weapon." Utah Code Ann. § 76-6-302(1)(a) (Supp. 1989), as do the statutes setting forth the elements of other "aggravated" crimes, e.g., Utah Code Ann. § 76-5-103 (Supp. 1989) (aggravated assault), Utah Code Ann. § 76-6-203 (Supp. 1989) (aggravated burglary). We agree with the State that this change to conform the language of the aggravated robbery statute evinces the legislature's intent that the sentence enhancement provision apply uniformly to all aggravated crimes, including aggravated robbery.

Although it is unclear why the legislature amended section 76-6-302(1)(a) in 1975 to add the specific term "firearm" to the aggravated robbery statute since robbery committed with a firearm was already covered by the general term "deadly weapon" retained in the subsection, we conclude that the amendment created no ambiguity over what penalty the legislature intended for robbery committed with a firearm. The legislature was merely increasing the degree of a robbery committed with the enumerated instruments of violence. In its subsequent adoption of the enhancement provision for firearm use in the commission of a first degree felony, the legislature exercised its authority to determine that, because firearms are more dangerous than knives or other deadly weapons, their use was more deserving of enhanced punishment. See *Angus*, 581 P.2d at 994-95.

Finally, Webb asserts that, even if the enhancement provisions of section 76-6-303(1) are applicable to his aggravated robbery conviction, the trial court erroneously imposed a total of six years as the term of enhancement. Based on the Utah Supreme Court's interpretation of the firearm enhancement statute as providing for a maximum enhancement term of five years, *State v. Willett*, 694 P.2d 601 (Utah 1984), the State concedes that the trial court erroneously imposed a six year enhancement term.

We, therefore, direct the trial court upon remand to reduce the enhancement sentence for use of a firearm in the commission of the first degree felony of aggravated

robbery from a total of six years to a total of five years. With this correction of the sentence, Webb's conviction is affirmed.

BENCH, J., and J. ROBERT BULLOCK, Senior District Judge concur.



**RICHFIELD CITY, Plaintiff  
and Respondent,**

**v**

**James M. WALKER, Defendant  
and Appellant**

**No. 890156-CA**

Court of Appeals of Utah

March 26, 1990

Driver was convicted in the Sixth Circuit Court, Sevier County. David L. Mower, J., of being in actual physical control of vehicle while having blood alcohol level of 21%. Driver appealed. The Court of Appeals, Garff, J., held that (1) city ordinance under which driver was convicted was consistent with statutes, and (2) driver was in actual, physical control of truck while he was sleeping.

Affirmed

## **1 Criminal Law** $\S$ 254.2, 260.11(3)

Stipulated facts were not functionally equivalent of findings of fact, and, thus, Court of Appeals was not required to defer to trial court's findings.

## **2 Automobiles** $\S$ 316

**Municipal Corporations**  $\S$ 592(2)

Statutory prohibition against driving or being in actual physical control of vehicle with blood alcohol content of .08% or greater as shown by chemical test given within two hours after alleged operation or